Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS
AND THE STATE OF NEW JERSEY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§7408-7409, direct the Administrator of the Environmental Protection Agency ("EPA") to set and periodically revise national ambient air quality standards ("NAAQS") for a limited subset of air pollutants, based on the latest scientific evidence concerning the nature and magnitude of the effects of these pollutants on public health and welfare. Sections 181 and 182 of the Act, 42 U.S.C. §§ 7511-7511f, impose specific deadlines and requirements on those portions of the nation not in compliance with the ozone NAAQS in effect when Congress added these provisions to the Act. The questions presented are as follows:

1. Whether the EPA Administrator's 1997 promulgation of revised NAAQS for particulate matter and ozone rested on an application of Clean Air Act sections 108 and 109 that amounts to an unconstitutional delegation of legislative authority to the executive in violation of Art. I, § 1 of the Constitution.

2. Whether sections 181 and 182 of the Clean Air Act permit the Administrator to promulgate a revised ozone NAAQS but forbid her to enforce the revised standard.

PARTIES TO THE PROCEEDINGS

Petitioners, intervenors in the appeals court, are the Commonwealth of Massachusetts and the State of New Jersey.

Respondents are the Environmental Protection Agency (which was a respondent below); National Stone Association, Kennecott Holdings Corporation, Kennecott Energy and Coal Company, Kennecott Services Company, David Matusow, Citizens for Balanced Transportation, West Virginia Chamber of Commerce, Midwest Ozone Group, Nevada Mining Association, Newmont Gold Company, Meridian Gold Company, Idaho Mining Association, American Iron & Steel Association, National Small Business United, American Farm Bureau, Duquesne Light Company, American Trucking Associations, American Public Power Association, Appalachian Power Co., American Petroleum Institute, National Association of Manufacturers, Western Fuels Association, Inc., National Association of Home Builders, American Iron & Steel Institute, Alliance of Automobile Manufacturers Association, National Mining Association, American Forest & Paper Association, Inc., National Petroleum Refiners Association, National Petroleum Institute, Chemical Manufacturers Association, Non-ferrous Founders' Society, State of West Virginia, Ohio Mining & Reclamation Association, State of Ohio, State of Michigan, United Mine Workers of America, AFL-CIO, Small Business Survival Committee, Equipment Manufacturers Institute, National Paint and Coatings Association, National Small Business United, National Automobile Dealers Association, American Farm Bureau Federation (all petitioners below); and the American Lung Association, American Public Power Association, Texas Gas Transmission Corporation, Atlantic City Electric Company, and American Road & Transportation Builders Association (intervenors below).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1-63) is reported at 175 F.3d 1027. The following orders of the court of appeals are reported at 195 F.3d 4: the order granting in part and denying in part petitioners' petition for rehearing (App. 64-82); the order denying, by a vote of 4-5 of the judges participating, EPA's petition for rehearing *en banc* (App. 83-91); and the order denying petitioners' petition for rehearing *en banc* (App. 92-93).

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. On October 29, 1999, petitioners' timely petition for rehearing was granted in part and denied in part; petitioners' timely petition for rehearing *en banc* was denied; and the court denied, by a 4-5 vote of the judges participating in the decision, EPA's timely petition for rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, § 1, of the Constitution provides in pertinent part that "All legislative Powers herein granted shall be vested in a Congress of the United States . . ."

The statutory and regulatory provisions relevant to this case are set forth *infra*, App. 94-113.

STATEMENT

In 1997, EPA revised its existing air quality standards for particulate matter ("PM") and ozone. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,655 (1997) ("PM Final Rule"); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,860 (1997) ("Ozone Final Rule"). It acted on the basis of exhaustive scientific inquiry into the nature and magnitude of the effects of these pollutants on human health and welfare. EPA estimated that its revised standards together could save as many as 15,000 additional lives per year as compared to the previous standard, and also annually prevent hundreds of thousands of additional cases of aggravated asthma and significantly decreased lung function.[1]

The D.C. Circuit held that the Clean Air Act, as applied in these rulemakings, delegates authority to the executive in violation of the Constitution. The court also held that section 181 of the Act, 42 U.S.C. § 7511, prevents EPA from enforcing the revised ozone standard.

Judge Tatel dissented from the panel's decision on the delegation question. (App. 55.) Five judges – a majority of those participating – voted to rehear the case *en banc*. (App. 84.) But because D.C. Circuit rules require that a majority of the court's active sitting judges vote in favor of rehearing a case

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[1]Hearing on Use of Fire As a Management Tool and Its Risks and Benefits for Forest Health and Air Quality Before the House Comm. On Resources, 105th Con. 1st Sess., Sept. 30, 1997, Serial No. 105-45, p. 16 (statement of Carol Browner).

en banc, and because two active judges did not participate in the decision, rehearing *en banc* was denied.[2]

A. Statutory and Regulatory Background

1. Establishing and Revising the NAAQS

The Clean Air Act requires the Administrator ("Administrator") of EPA to establish and periodically revise national ambient air quality standards ("NAAQS") for a limited subset of air pollutants. 42 U.S.C. §§ 7408-7409. These standards identify the maximum permitted level of the regulated pollutants in the outside air.[3]

NAAQS may be set only for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare" and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408(a)(1)(A)-(B). Thus NAAQS may be set only for widespread pollutants that endanger public health or welfare. Today, NAAQS exist for six

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[2]Federal Rules of Appellate Procedure and Corresponding Circuit Rules of the District of Columbia Circuit, Rule 35(a) (circuit rules as amended through 1-3-00).

[3]Primary NAAQS are designed to protect the public health. 42 U.S.C. § 7409(b)(1). Secondary standards are designed to protect public welfare, *id.* § 7409(b)(2), broadly defined to include, for example, effects on soils, crops, and wildlife, *id.* § 7602(h). The primary and secondary standards at issue here are identical. PM Final Rule, 62 Fed. Reg. at 38,683; Ozone Final Rule, 62 Fed. Reg. at 38,877.

air pollutants: PM, sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone, and lead. See 40 C.F.R. §§ 50.4 - 50.12.

The Clean Air Act directs the Administrator to review the NAAQS every five years. 42 U.S.C. § 7409(d)(1). Based on this review, the Administrator may promulgate a new NAAQS, or revise an existing one. *Id.* § 7409(a)(1). No new pollutant has been regulated under the NAAQS program since 1978, when the NAAQS for lead was issued.[4]

The Clean Air Act requires extensive scientific inquiry into the nature and severity of harm caused by an air pollutant before a NAAQS for that pollutant can be established or revised. The Act requires, first, that air quality "criteria" be developed for pollutants in the NAAQS program. These criteria – which are described in a "criteria document" prepared by the agency – must reflect "the latest scientific knowledge" indicating the "kind and extent of all identifiable effects on public health or welfare." 42 U.S.C. § 7408(a)(2).

The Act requires, in addition, that a scientific advisory committee – known as the Clean Air Scientific Advisory Committee, or "CASAC" – review the air quality criteria and NAAQS. The committee must recommend to the Administrator any new or revised NAAQS that may be appropriate in light of the statutory requirements, and must also describe the areas in which "additional knowledge" is required to evaluate any NAAQS. 42 U.S.C. § 7409(d)(2)(B)-(C).

The NAAQS themselves must be "based on" the air quality criteria. 42 U.S.C. § 7409(b)(1). They must be set at a level which, "allowing an adequate margin of safety, are requisite to

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[4]43 Fed. Reg. 46,246 (1978).

protect the public health." *Id.* § 7409(b)(1). The Administrator may significantly depart from the recommendations of CASAC only if she explains why she has done so. *Id.* § 7607(d)(3). EPA has consistently interpreted the Clean Air Act to require the protection of sensitive subpopulations such as children, the elderly, and people with respiratory problems. *Lead Industries Assoc. v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980).

2. Implementing the NAAQS

Once the NAAQS are established or revised, attention shifts to achieving them. Although the Clean Air Act gives the states the primary responsibility to implement the programs to achieve the NAAQS, 42 U.S.C. § 7410, the statute also significantly constrains the timing and content of the process of implementation.

Designation: Attainment Status. Implementation begins with the designation of areas according to whether their air quality complies with the NAAQS. The three possible designations are "attainment" (area meets the NAAQS), "nonattainment" (area does not meet them), or "unclassifiable" (area's attainment status cannot be determined based on available information). 42 U.S.C. § 7407(d)(1)(A)(i)-(iii).

Section 107(d) provides that areas may be designated at three different points in time. First, areas may be designated when a new NAAQS is established, or an existing one revised. 42 U.S.C. § 7407(d)(1). Second, areas were designated following the 1990 Amendments to the Clean Air Act. *Id.* § 7407(d)(4). Third, areas may be "redesignated" based on new information. *Id.* § 7407(d)(3). For example, an attainment area may be redesignated as nonattainment if its air quality ceases to meet the NAAQS.

State Implementation Plans. The next step toward achieving the NAAQS is for the states to submit state implementation plans, or "SIPs." 42 U.S.C. § 7410. These plans specify the measures states will take to attain or maintain the NAAQS within their borders. *Id.* § 7410(a)(1). A state may consider cost and technological feasibility in developing its SIP; indeed, "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires . . ." *Union Electric Company v. EPA*, 427 U.S. 246, 266 (1976).

Nonattainment. Special rules apply with respect to areas designated as nonattainment. Part D of Subtitle I sets forth requirements for SIPs in states containing nonattainment areas. 42 U.S.C. §§ 7501-7515. Part D establishes both *what* is required in the SIPs of states that contain nonattainment areas and *when* it is required. Part D contains five subparts. Subpart 1 sets forth rules for nonattainment areas in general. 42 U.S.C. § 7501-7509a. Subparts 2-5, added to the Act in 1990, impose new requirements on areas that were then in nonattainment for any of the pollutants covered by the NAAQS. *Id.* §§ 7511-7514a.

Subpart 1. Under Subpart 1, after designating an area as nonattainment under section 107(d), the Administrator may "classify" the area, in accordance with the severity of its air quality problem, for the purpose of setting a deadline for attainment. 42 U.S.C. § 7502(a)(1)(A). The significance of classification is that nonattainment areas bearing different classifications may be given different attainment dates.

Subpart 1 contains a number of specific requirements for the SIPs in nonattainment areas. For example, these SIPs must require "reasonable further progress" toward attaining the NAAQS. With respect to timing, Subpart 1 provides that the attainment date for areas not meeting a primary NAAQS is "as

expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment . . ." 42 U.S.C. §7502(a)(2)(A).

Subpart 2. Subpart 2 imposed new, more specific requirements on areas that had not attained the ozone standard existing in 1990, when Subpart 2 was enacted. Like Subpart 1, Subpart 2 prescribes both the general content of SIPs and the deadlines for meeting statutory requirements and achieving the NAAQS. The specific requirements and deadlines depend on an area's classification.

Section 181 of Subpart 2 provides, as its title says, "classifications and attainment dates for 1989 nonattainment areas." 42 U.S.C. § 7511. Areas "designated nonattainment for ozone pursuant to section 7407(d)" are to be "classified at the time of such designation, under table 1, by operation of law ..." *Id.* § 7511(a)(1). The classifications in table 1 range from "marginal" to "extreme." *Id.* § 7511(a)(1). These classifications are tied to the area's "design value," which is measured in parts per million ("ppm") of ozone in the ambient air. *Id.* § 7511(a)(1) (table 1, n. *).

The design values in table 1 of section 181(a)(1) range from 0.121 to 0.280 and above. 42 U.S.C. § 7511(a)(1). The level of the ozone standard in effect when section 181(a)(1) was enacted was 0.12 ppm. Ozone Final Rule, at 38,857. Thus the lowest of the "design values" reflected in table 1 of section 181(a)(1) is also the lowest ozone concentration that would have qualified an area as nonattainment under the ozone standard that existed in 1990.

Subpart 2's specific requirements for SIPs are set forth in sections 182-185B. 42 U.S.C. § 7511a-f. The requirements escalate with each classification. See *id.*§ 7511a(a)-(e). All

nonattainment areas must meet the requirements set for any areas with lower design values, plus additional, more stringent requirements. For "marginal" areas, the SIP requirements largely track those of Subpart 1. *Id.* § 7511a(a). Areas classified as "moderate" and above must also, for example, measure their "baseline emissions" of ozone precursors in 1990, and then demonstrate "reasonable further progress" – measured according to specific percentage reductions in emissions – at regular intervals. *Id.* §§ 7511a(b)(1), (c)-(e).

With respect to timing, section 181(a)(1) requires that attainment of the NAAQS be achieved "as expeditiously as practicable but not later than" the dates specified in that section. 42 U.S.C. § 7511(a)(1). These dates range from 1993 to 2010. *Id.* § 7511(a)(1). States must also meet each of the SIP requirements described above within a specified number of years. Subpart 2 consistently specifies November 15, 1990, as the date when the deadline "clock" for the SIP requirements begins to run. *Id.* §§ 7511a(a)-(g).

Interstate Pollution. Air pollution does not respect political boundaries. The Clean Air Act acknowledges this physical reality in provisions that specifically target interstate air pollution. Section 110(a)(2)(D) requires states to include within their SIPs provisions to prevent sources within their borders from "contribut[ing] significantly" to nonattainment in other states. 42 U.S.C. § 7410(a)(2)(D). Section 110(k)(5) requires EPA to call for revisions to a SIP when the SIP is inadequate. 42 U.S.C. § 7410(k)(5). Such an action by EPA is known as a "SIP call." A SIP call may be based on EPA's finding that sources within a state are contributing significantly to nonattainment in another state. This finding – called a "section 126 finding" after the section of the Clean Air Act that permits it – may be requested of EPA by any state experiencing the ill effects of interstate pollution. 42 U.S.C. § 7426(b).

B. Rulemakings on Particulate Matter and Ozone

1. Particulate Matter

Particulate matter ("PM") refers to a broad class of diverse substances that exist as discrete particles over a wide range of sizes. Particles originate from a variety of stationary and mobile sources as well as from natural sources. EPA first promulgated a NAAQS for PM in 1971. 36 Fed. Reg. 8186 (1971). In July 1987, EPA revised the standard, changing *inter alia*, the PM indicator from total suspended particles to particulate matter with an aerodynamic diameter of less than or equal to a nominal ten micrometers ("PM_{10}"). 52 Fed. Reg. 24,854 (1987).

In April 1994, EPA announced its intention to develop a revised air quality criteria document for PM. The focus of the review was recent epidemiological evidence reporting associations between ambient concentrations of PM and a range of serious health effects, including effects caused by particulates with an aerodynamic diameter far smaller than ten micrometers ("PM_{10}"). During the next two years, the agency held several workshops, provided opportunities for public comment on a draft criteria document, and sponsored CASAC review of the document at public meetings.

On November 27, 1996, EPA announced its proposed decision to revise the PM NAAQS. 61 Fed. Reg. 65,638 (1996). EPA proposed adding two new PM NAAQS that measured particulates with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers ("$PM_{2.5}$"). The proposal also specified several other key parameters for the revised standards: (1) concentration (level); (2) averaging time (the period over which pollutant levels are averaged in measuring compliance); and (3) form (the air quality statistic used as a

basis for determining compliance with the standard). The Administrator described several alternative standards using these parameters, including possible changes in the then-existing PM_{10} NAAQS. *Id.* at 65,662.

On July 18, 1997, EPA announced final revisions to its PM NAAQS. 62 Fed. Reg. 38,652 (1997). The Administrator determined that it was appropriate to establish new annual and 24-hour NAAQS for $PM_{2.5}$ and to revise the current 24-hour PM_{10} standard.[5] The Administrator noted that that the agency had undertaken an especially rigorous review and reanalysis of existing scientific data and that recent studies provided "evidence that serious health effects (mortality, exacerbation of chronic disease, increased hospital admissions, etc.) are associated with exposures to ambient levels of PM found in contemporary U.S. urban airsheds even at concentrations below current U.S. PM standard." *Id.* at 38,655. The Administrator further described the results of risk assessments of two cities that, while accompanied by significant scientific uncertainty, "found that the risk remaining after attaining the current PM_{10} standards was on the order of hundreds of premature deaths each year, hundreds to thousands of respiratory-related hospital admissions, and tens of thousands of additional respiratory related symptoms in children." *Id.* at 38,656.

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[5]For $PM_{2.5}$, the EPA set a level of 15 $\mu g/m^3$ with compliance measured based on the three-year average of the annual artithmetic mean $PM_{2.5}$ concentrations from single or multiple community-oriented monitors, and also set a level of 65 $\mu g/m^3$ based on the three-year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each population-oriented monitor within an area. For PM_{10}, EPA changed the form of the standard. PM Final Rule, 62 Fed. Reg. at 38,652.

2. Ozone

Ground-level ozone is formed as a result of chemical reactions of volatile organic compounds, nitrogen oxides, and oxygen in the presence of sunlight. EPA first issued a NAAQS for ozone (or "photochemical oxidants") in 1971. 36 Fed. Reg. 8187 (1971). The original standard specified a maximum level of 0.08 ppm, averaged over one hour, with one exceedance allowed per year. That standard was revised in 1979 by increasing the allowable level to 0.12 ppm. 44 Fed. Reg. 8202 (1979).

The EPA initiated a review of the air quality criteria and standards for ozone in August 1992. In an iterative process involving EPA staff, CASAC, and the public, EPA developed a criteria document on the health and welfare effects of ozone. On November 27, 1996, EPA proposed to revise the NAAQS for ozone. 61 Fed. Reg. 65,716. EPA proposed to replace the one-hour, 0.12 ppm primary standard with an eight-hour, 0.08 ppm standard, with a new form for measuring compliance with the standard. The proposal solicited comments on alternative standards reflecting different levels, averaging times, and forms. *Id.* at 65,731, 65,733.

On July 18, 1997, EPA announced final revisions to its ozone NAAQS. 62 Fed. Reg. 38,856 (1997). The final rule set a level of 0.08 ppm, with an averaging time of eight hours and a form based on the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area. *Id.* at 38,873.

In revising the ozone standard, the Administrator invoked a large body of scientific evidence consisting of clinical, epidemiological, and animal studies revealing the adverse effects of ozone at levels allowed by the previous standard. 62 Fed. Reg. at 38,863-65. She cited "clear evidence from human clinical studies" showing that the adverse effects from exposure to ozone include "lung function decrements, respiratory symptoms (e.g., cough, pain on deep inspiration), nonspecific bronchial responsiveness, and biochemical indicators of pulmonary inflammation." *Id.* at 38,863. The Administrator also cited the "numerous epidemiological studies [that] have reported excess hospital admissions and emergency department visits for respiratory causes (for asthmatic individuals and the general population) attributed primarily to ambient [ozone] exposures, including [ozone] concentrations below the level of the current standard, with no discernible threshold at or below this level." *Id.* at 38,864.

In setting the parameters for the revised ozone standard, the Administrator noted that CASAC had unanimously endorsed an eight-hour averaging period and that all CASAC members who had expressed specific opinions on the form of the standard had favored a form allowing multiple exceedances (as the final rule did). 62 Fed. Reg. at 38,861, 38,869. As for the level of the standard, the Administrator acknowledged that no one correct policy response emerged from the scientific evidence. *Id.* at 38,863. In choosing between levels of 0.09, 0.08, and 0.07, however, the Administrator placed "great weight" on the fact that no member of CASAC had endorsed the 0.07 level, and stressed that severity of effects decreased, and uncertainty increased, at levels below 0.08 ppm. *Id.* at 38,854, 38,868. In rejecting the 0.09 ppm level, the Administrator emphasized that such a standard would result in many more adverse health

effects, particularly among children, than would the 0.08 ppm level. *Id.* at 38,867-68.[6]

C. The Court of Appeals' Initial Decision

Pursuant to section 107(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), numerous parties filed petitions for review of EPA's revised standards in the D.C. Circuit.

1. Delegation

The D.C. Circuit found that EPA's application of the Clean Air Act in these rulemakings effected a "delegation of legislative power" in violation of Article I, § 1, of the Constitution. (App. 3.) The court explained that "EPA appears to have articulated no 'intelligible principle' to channel its application of the[] factors [it uses in setting NAAQS]; nor is one apparent from the statute." (App. 4.)

The court came to this conclusion based on its review of EPA's 1997 rulemakings on PM and ozone. The court found the agency's explanations for its rules constitutionally deficient because they did not identify a "stopping point" for regulation. (App. 10.) Although the court agreed that the factors EPA considers in setting air quality standards – such as the nature

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[6]In both rulemakings, EPA went to extraordinary lengths to facilitate public participation: the agency established a toll-free telephone hotline; set up a system enabling electronic comments via the Internet; held multiple public meetings at which over 400 citizens and organizations testified; fielded over 14,000 phone calls and over 4,000 electronic mail messages; and held two national satellite telecasts to answer questions. EPA also received over 50,000 written and verbal comments. 62 Fed. Reg. at 38,654; 62 Fed. Reg. at 38,858.

and severity of health effects, the size of the affected population, and the kind of health information available and the uncertainties surrounding it – were reasonable, it concluded that these factors "do not themselves speak to the issue of degree." (App. 6.) The court also dismissed as irrelevant the exhaustive scientific review underlying EPA's standards. (App. 8.)

The court remanded the case to the agency rather than overturning the pertinent statutory provisions outright. The court acknowledged that its approach would not satisfy what it called a "key function of non-delegation doctrine," which is to ensure that Congress, not the agency, exercises legislative authority. (App. 12-13.) Indeed, the court conceded that under its approach, "[t]he agency will make the fundamental policy choices." (App. 13.)

In closing, the court suggested the kinds of standards that might pass constitutional muster after remand. Cost-benefit analysis was the court's first proposal, but the court acknowledged that this option was not open to EPA given the D.C. Circuit's rulings interpreting the Clean Air Act to forbid the consideration of costs. (App. 13.) Alternatively, the court appeared to endorse the possibility of setting environmental standards according to their effect on "quality-adjusted life-years," although it conceded that the Department of Health and Human Services had determined that an approach of this sort utilized by Oregon in the health-care context violated the Americans with Disabilities Act. (App. 15 n. 5.)

2. Enforcement of Ozone Standard

The D.C. Circuit also addressed claims that EPA could neither issue nor enforce a revised ozone standard. The court found that EPA could indeed issue a revised ozone standard, and also designate areas as nonattainment under the revised

standard. (App. 31-34.) However, the court also concluded that EPA could not enforce a revised ozone standard "other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." (App. 31.)

In other words, with respect to the *timing* of the achievement of the revised ozone standard, the court of appeals' ruling means that EPA may not prescribe *attainment dates* different from those specified in section 181(a)(1). EPA also may not *classify* a nonattainment area other than in accordance with the requirements of section 181(a)(1). As for the *means* of achieving the revised ozone NAAQS, the court of appeals barred EPA from requiring any control measures other than those required by Subpart 2. (App. 31.)

The court found that section 181(a)(1), 42 U.S.C. § 7511(a)(1), was unambiguous. Because section 181(a)(1) refers to nonattainment designations made under "section 7407(d)," the court concluded that the classifications and attainment dates specified by section 181(a)(1) apply to areas designated as nonattainment under any of the provisions of section 107(d). (App. 34-35.) This meant, according to the court, that areas designated nonattainment under section 107(d)(1), following the revision of a NAAQS, are also governed by Subpart 2. Having found the statute clear, the court refused to defer to EPA's interpretation, which allowed enforcement of the revised standard outside of Subpart 2. (App. 37-39.)

The court suggested that any other interpretation of section 181(a)(1) would not make sense. The court appeared to endorse the reasoning of petitioners below that "because the 1990 amendments extended the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS, they must preclude EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS." (App. 37.)

D. The Court of Appeals' Partial Grant of Rehearing and Denial of Rehearing En Banc

1. Delegation

The panel voted 2-1 to deny rehearing on the question whether the Clean Air Act as applied in the PM and ozone rulemakings unconstitutionally delegates legislative authority to the executive. (App. 64-82.)

The court of appeals voted 5-4 in favor of rehearing the delegation question *en banc*, but rehearing *en banc* was nevertheless denied. (App. 84.) Judge Silberman wrote a dissent from the denial of rehearing *en banc*. (App. 85-89.)

2. Enforcement of Ozone Standard

The panel granted rehearing in part on the question whether the revised ozone standard could be enforced. The panel replaced the language in its initial opinion stating that EPA "cannot be enforced by virtue of Clean Air Act § 181(a)" (App. 53) with language stating that EPA could enforce a revised standard "only in conformity with Subpart 2." (App. 75.)[7]

Judge Tatel concurred in the partial grant of rehearing. He believed that the modified opinion left "open the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates." (App. 76.) He found that EPA may enforce the revised standard in

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[7]The panel also modified its opinion to clarify that "Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS 'as expeditiously as practicable.'" (App. 74.)

areas that have attained the former ozone standard, but not in areas that have not yet attained that standard. (App. 81.)

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's constitutional ruling is inconsistent with over six decades of decisions from this Court upholding broad assignments of authority from the legislative to the executive branch. In comparison with standards this Court has upheld, the Clean Air Act is far more restrictive of agency discretion. Nothing in this Court's nondelegation jurisprudence sanctions the court of appeals' unusual approach to delegation, according to which the agency to which unconstitutionally broad discretion has supposedly been granted must supply quantitative limits for its own discretion.

In addition, in preventing EPA from enforcing its revised ozone standard, the court of appeals ignored the clear language of the Clean Air Act. The result is to create a bizarre regulatory scheme that is at odds with the Act's language and purposes. At the very least, the court of appeals should have deferred to EPA as to the meaning of the relevant statutory provisions.

The D.C. Circuit's decision has enormous immediate significance for the entire country. The decision places states' regulatory obligations in a posture of extreme uncertainty, and has enormous implications for the public health. There is now no NAAQS in place in most of the country for ozone. In addition, the ruling has delayed, and partially undermined, petitioners' longstanding efforts to reduce interstate air pollution that places their citizens' health at risk.

There is no reason to wait for a circuit split to develop as to the constitutionality of the Clean Air Act or the enforceability of the revised ozone standard. Such a split is impossible: only

the D.C. Circuit may review nationally applicable standards issued under the Clean Air Act. 42 U.S.C. § 7607(b)(1). Thus immediate review in this Court is warranted.

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S RULINGS ON THE "DELEGATION" DOCTRINE.

The Clean Air Act establishes minimum requirements for air quality throughout the nation. The court of appeals ruled that this statute, as interpreted by EPA and the courts for the last three decades, is unconstitutional as a delegation of legislative power. In doing so, the court ignored this Court's decisions upholding much broader assignments of authority to administrative agencies than the assignment made by the Clean Air Act. The court compounded its error when it then turned to the agency itself to enunciate an "intelligible principle" in the form of a meta-standard to govern future rulemakings.

In holding that the Clean Air Act enunciates no "intelligible principle" limiting agency action, the court of appeals departed from over six decades of unbroken precedent from this Court finding such a principle in statutes far less constraining than the Clean Air Act. During this period, this Court has, "without deviation," upheld Congress's authority to seek assistance from administrative agencies under "broad standards." *Mistretta v. United States*, 488 U.S. 361, 373 (1989). For example, this Court has affirmed the Federal Communications Commission's authority to regulate broadcast licensing in the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943), and to issue regulations "as public convenience, interest, or necessity requires," *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); the Federal Power Commission's authority to determine "just and reasonable" rates, *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944);

and the Attorney General's authority – even absent notice and comment rulemaking – to designate controlled substances and criminalize their manufacture, possession, and use, *Touby v. United States*, 500 U.S. 160 (1991).

The Clean Air Act constrains agency discretion at least as much as the statutory standards this Court has previously upheld. First, NAAQS apply to only a handful of pollutants – widespread pollutants (i.e., those from "numerous and diverse sources") that endanger public health or welfare. Thus the territory over which EPA's discretion may range is limited.

Second, the Act requires extensive scientific inquiry into the nature and severity of harm caused by an air pollutant. The development of criteria documents, identifying the "kind and extent of all identifiable effects on public health or welfare," 42 U.S.C. § 7408(a)(2), and the submission of the criteria documents and NAAQS themselves to CASAC's review, *id.* § 7409(d)(2)(B), ensure that NAAQS will emerge from the best available scientific evidence.

Third, in actually setting NAAQS, EPA's discretion is constrained in several important ways. NAAQS must be set at a level which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The use of the term "requisite" limits EPA's standard-setting discretion on the low end. In addition, NAAQS must be "based on" the air quality criteria. *Id.* § 7409(b)(1). These criteria must themselves be based on the latest scientific information as to the "kind and extent" of effects of the relevant air pollutants on human health and welfare. *Id.* § 7408(a)(2). By explicitly focusing the scientific inquiry on the "kind and extent" of human health effects, the Act communicates to EPA an intent to distinguish among health effects based on their severity and magnitude. This is just what EPA did in the rules at issue here.

See, e.g., Ozone Final Rule, 62 Fed. Reg. at 38,859, 38,860, 38,864. Moreover, the Administrator may significantly depart from CASAC's recommendations only if she explains why she has done so. *Id.* § 7607(d)(3). In this case, when CASAC was able to achieve a consensus, the Administrator's actions hewed closely to it. In setting the ozone standard, for example, the Administrator considered ozone levels only within a range approved by CASAC, and declined to set the standard at the lowest end of that range in part because no member of CASAC had endorsed such a low standard. Ozone Final Rule, 62 Fed. Reg. at 38,861, 38,868.

Finally, the Administrator's discretion in promulgating NAAQS is constrained by the fact that her actions are subject to the exacting requirements of the Administrative Procedure Act, and are subject to judicial review for arbitrariness. This Court has suggested that procedural requirements and the availability of judicial review are important factors in evaluating the propriety of Congress's assignments of authority to the executive branch. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Touby v. United States*, 500 U.S. 160, 168-69 (1991).

Given the constraints the Clean Air Act imposes on EPA, the Act should have unquestionably survived constitutional scrutiny under this Court's precedents. However, even though the court of appeals explicitly held that the Clean Air Act does not provide the "intelligible principle" necessary for purposes of the delegation doctrine (App. 4), the court did not look in any detail at what the Clean Air Act does. Instead, it examined what EPA did, and concluded that because EPA had not identified a precise "stopping point" for regulation, its actions were unconstitutional. (App. 10.) Although the court of appeals did not say so explicitly, close examination of the alternative approaches the court endorsed reveals that the court appears to

have believed that EPA must – as a matter of constitutional principle – *quantify* the point at which it will stop regulating to protect human health. (App. 13, 15 (proposing cost-benefit analysis and "quality-adjusted life-years" as antidotes to an unconstitutional delegation)).

In not one of the "nondelegation" cases cited above did the statutory standard upheld by this Court specify a precise stopping point for achievement of desired ends such as the public interest and justice. And in none of these cases did this Court suggest that the *agency* must supply such a stopping point if Congress does not. Allowing an agency to supply the "intelligible principle" that this Court has required (and the court of appeals erroneously found lacking here) is perverse in light of the essential purpose of the nondelegation doctrine, which is to ensure that Congress, not the agency, makes basic policy choices. By requiring of the agency a precise stopping point for regulation, the court below introduced a principle new to constitutional law – that agencies must, in advance of specific rulemakings, develop a meta-standard quantifying the precise tradeoffs they will make among the broad purposes they are charged to serve.

II. THE COURT OF APPEALS' DECISION BLOCKING ENFORCEMENT OF THE REVISED OZONE STANDARD IS INCONSISTENT WITH THE CLEAN AIR ACT'S LANGUAGE AND PURPOSES, AND WITH EPA'S REASONABLE INTERPRETATION OF THE ACT.

The court of appeals held that EPA was required to review the ozone standard, and to revise it if appropriate, every five years, and also to designate areas as nonattainment for ozone in light of the revised standard. (App. 31-34.) Nevertheless, the court held that EPA could not enforce this revised standard

"other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2." (App. 31.) EPA may not, in other words, require the states to do anything more to achieve the revised ozone NAAQS than they were already required to do in order to achieve the former ozone NAAQS.

In short, according to the D.C. Circuit, EPA can be required by section 109 to promulgate a revised ozone standard necessary to safeguard public health and welfare but the agency is powerless to enforce that standard no matter how serious and widespread the public health consequences of such compelled agency inaction. Nowhere, however, does the Clean Air Act suggest, let alone compel, a finding that Congress intended such a perverse result.[8]

Certainly, section 181, upon which the D.C. Circuit relied (App. 35), reveals no indicia of such congressional intent.

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[8]In concurring in the partial grant of rehearing, Judge Tatel read the revised majority opinion as allowing EPA to enforce the revised ozone standard in areas that have attained the former standard. (App. 81.) Given the critical importance of this issue, the panel's failure to engage Judge Tatel's view creates doubt as to whether this interpretation is accurate. In addition, the panel's explanation for its decision not to vacate the revised ozone standard – that the standard was not "likely to engender costly compliance activities"in light of the court's holding on Subpart 2 (App. 75) – is hard to reconcile with Judge Tatel's perspective on the panel's opinion. In any event, even if Judge Tatel's interpretation of the panel's opinion were accurate, the panel's opinion still raises enormous legal and practical problems regarding EPA enforcement of the new standard in areas that have *not* attained the former standard.

Section 181(a)(1), table 1, provides classifications and attainment dates only for the former ozone standard, not for the revised standard. This is clear from the language of the provision itself. First, table 1 of section 181(a)(1) classifies areas according to a "design value" which is measured in parts per million ("ppm"). The lowest design value reflected in table 1 is 0.121 ppm. The range of design values in table 1 is thus clearly keyed to the former ozone standard of 0.120 ppm. This interpretation is reinforced by the title of section 181(a)(1), "Classification and attainment dates for 1989 nonattainment areas"; this language also indicates that section 181(a)(1) specifies classifications and attainment dates only for areas in nonattainment for the ozone standard existing in 1990.

The court's ruling also makes a hash of section 181(a)(1)'s language specifying the procedure for designation and classification. According to the court, EPA must designate areas as nonattainment (or attainment, or unclassifiable) under the revised, eight-hour, 0.08 ppm ozone standard. (App. 33-34.) Because section 181(a)(1) provides that classification must occur "at the time of . . . designation," 42 U.S.C. § 7511(a)(1), EPA will also be required, at the same time, to *classify* the areas designated as nonattainment under the revised standard. However, section 181(a)(1) also requires that classifications be based on the design value as calculated by the interpretation methodology existing in November 1990. *Id.* § 7511(a)(1). This methodology looked to the ozone standard existing in 1990, not the revised ozone standard existing now.[9] For this reason, and because the court of appeals has required EPA to

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[9]See Memorandum from William G. Laxton, Director, Technical Support Division, U.S. EPA, "Ozone and Carbon Monoxide Design Value Calculations" (June 18, 1990) (http:www.epa.gov/airprogm/oar/oaqps/greenbk/laxton.html).

classify areas under the terms of section 181(a)(1), EPA's new classifications under the revised standard will be based on design values calculated according to the *former* ozone standard, not the revised standard. Thus, in classifying areas under the revised standard EPA will be required to disregard the design values it calculated in order to designate areas under that standard. The court of appeals' interpretation turns section 181(a)(1) into a kind of parody.

Recognizing that section 181(a)(1) specifies classifications and attainment dates only for the ozone standard in effect in 1990 is also the only way sensibly to reconcile section 181(a)(1) with EPA's continuing responsibility to revise the NAAQS. As the court of appeals itself confirmed (App. 31-34), section 109 of the Clean Air Act requires EPA to review and, if appropriate, revise the NAAQS every five years. After issuing a revised NAAQS, EPA has two years to designate areas as attainment, nonattainment, or unclassifiable. 42 U.S.C. § 7407(d)(1). The review and revision of NAAQS, and the designation of areas according to their attainment status, are resource-intensive, time-consuming processes undertaken for a single purpose: to achieve healthful air quality for the citizens of the country. On the court of appeals' interpretation of the Clean Air Act, however, EPA's obligation to review and revise the ozone NAAQS, and to designate areas according to their attainment status, has no purpose other than to brand areas with the unwelcome label "nonattainment."

There is no warrant, in the language, structure, or history of the Clean Air Act, for requiring EPA to engage in such a pointless endeavor. In the Clean Air Act, Congress established means for EPA to protect public health in light of scientific evidence of the devastating health effects of air pollution – not means for the agency to announce that air quality is bad but at the same time limit EPA's ability to mitigate it.

The reference to "section 107(d)" in section 181(a)(1), on which the court of appeals so heavily relied, does not support a different conclusion. In finding that Congress's failure to refer specifically to section 107(d)(4) (rather than to section 107(d) as a whole), meant that EPA could not enforce the revised ozone standard except in conformity with Subpart 2, the court of appeals ignored all the rest of the language in Subpart 2, which requires the opposite conclusion. The consistent exclusive focus of Subpart 2 is the ozone NAAQS existing at the time Congress added Subpart 2 in 1990.

At the very least, the cascade of language in Subpart 2 indicating that Subpart 2 applies only to the former, one-hour ozone standard, combined with the absence of the single number (4) in section 181(a)(1), creates an ambiguity that EPA is entitled to resolve as long as it does so reasonably. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984). As set forth above, EPA's interpretation of Subpart 2 to apply only to the ozone standard existing in 1990 creates a sensible regulatory regime in which EPA is not forced to revise a NAAQS, and to designate areas according to their attainment status under the revised NAAQS, only to be barred from taking steps to achieve the NAAQS.

III. THE COURT OF APPEALS' DECISION WARRANTS REVIEW, NOTWITHSTANDING THE ABSENCE OF A DIRECT CIRCUIT CONFLICT, BECAUSE OF ITS ENORMOUS SIGNIFICANCE BOTH TO THE STATES AND FOR THE PUBLIC HEALTH AND BECAUSE NO SUCH CONFLICT IS POSSIBLE

Review of the court of appeals' ruling is further warranted because of its enormous significance to the states, including

petitioners Massachusetts and New Jersey, and to the public health. The rules at stake in this litigation are among the single most important national environmental standards promulgated in over a decade. They implicate the viability of massive regulatory programs which rely upon both the validity and enforceability of the revised ozone and PM NAAQS. Also at stake are the thousands of deaths and hundreds of thousands of illnesses that the Administrator concluded would be prevented only by attainment of the revised NAAQS. These enormous stakes alone would warrant this Court's review, even without a circuit conflict. Certainly, the absence of such a conflict should not bar this Court's review where, as here, the D.C. Circuit's exclusive jurisdiction makes the development of such a conflict impossible.[10]

A. The Ruling Has Great Practical Significance for the States.

All states have an interest, as sovereigns, in being certain of their rights and responsibilities under the Clean Air Act. The D.C. Circuit's ruling has placed those rights and responsibilities in a posture of extreme uncertainty in two respects: (1) the ruling has delayed and undermined longstanding efforts to reduce interstate air pollution; and (2) the former ozone

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[10]Petitioners have not sought review as to two other issues decided below. The court held that EPA should have considered the alleged health benefits of ozone in setting the ozone standard, and that EPA's choice of PM_{10} as an indicator for coarse particulate matter was arbitrary and capricious. (App. 41-50.) Unlike the court's rulings on delegation and on the enforceability of the revised ozone standard, these rulings do not undermine the entire analytical framework and implementation scheme on which the Clean Air Act depends.

standard has been revoked in most of the country and, as a result of the D.C. Circuit's ruling on Subpart 2 of the Clean Air Act, no enforceable standard has taken its place.

The ruling below has undermined petitioners' longstanding efforts to reduce the pollution that arrives inside their borders from other states. These efforts have led to "SIP calls" from EPA, requiring certain states to develop plans to reduce their emissions of oxides of nitrogen (major ozone precursors) in order to facilitate compliance with the NAAQS for ozone. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998). Petitioners' efforts have also resulted in "section 126 findings" from EPA, concluding that sources from other states have "significantly contribute[d]" to Massachusetts' failure to attain the air quality standard for ozone. *See* Findings of Significant Contribution and Rulemaking on Section 126 Petitions for Purposes of Reducing Interstate Ozone Transport; Final Rule, 65 Fed. Reg. 2674 (Jan. 18, 2000).

The ruling below has hindered petitioners' efforts to reduce interstate air pollution. As a result of the ruling, EPA scaled back its section 126 findings that other states were significantly contributing to the section 126 petitioners' inability to meet national air quality standards. *See* 64 Fed. Reg. 28,294-95 (tables showing broader geographic coverage under revised, eight-hour standard than under former, one-hour standard). In addition, the D.C. Circuit has temporarily stayed the "SIP calls" described above. Order on Stay, *State of Michigan v. EPA*, No. 98-1497 (D.C. Cir.) (May 25, 1999).

In short, the D.C. Circuit's ruling has had large ripple effects on the nation's program for achieving clean air. In holding the

ozone standard unlawful on constitutional grounds, and in blocking the enforcement of the ozone standard, the D.C. Circuit has, apparently unwittingly,[11] rent asunder EPA's carefully crafted, multi-prong, multi-state attack on ozone. It has also rendered more difficult petitioners' efforts to protect the health of their citizens through achievement of the NAAQS.

In addition, as a result of the ruling, there is now no enforceable ozone standard in effect in most of the country. In 1997, in light of the promulgation of revised standards for PM and ozone, President Clinton issued a memorandum to EPA in which he ordered EPA to begin revoking the former standards for ozone and PM in areas that had not exceeded those standards for three years. 62 Fed. Reg. 38,421 (July 16, 1997). EPA subsequently determined that the one-hour ozone standard was no longer applicable in 2,945 of the nation's 3,153 counties. 63 Fed. Reg. 31,014 (June 5, 1998); 63 Fed. Reg. 34,432 (July 22, 1998); 64 Fed. Reg. 30,911 (June 9, 1999).

EPA has issued a proposed rule rescinding its revocation of the one-hour ozone standard. Rescinding Findings that the 1-Hour Ozone Standard No Longer Applies in Certain Areas, 64 Fed. Reg. 57,424 (Oct. 25, 1999). The ultimate legal status of EPA's rescission of its revocation of the ozone standard has yet to be determined. This much is certain, however: there is now no enforceable ozone standard in place in most of the country, and the decision below has at least cast a shadow over EPA's

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[11] A recent opinion written by Judge Williams asserts that the 0.12 ppm, one-hour ozone standard "remains in place." *American Petroleum Institute v. EPA*, 2000 U.S. App. LEXIS 14 *4 n. 1 (Jan. 4, 2000). However, as discussed in this section, that standard has been revoked in most of the country.

efforts to reinstate the former ozone standard. This situation creates enormous uncertainty for the states as regulators.

This uncertainty is exacerbated by the precipitousness of the D.C. Circuit's ruling on delegation. The court failed to consider many nonconstitutional issues presented to it, delaying their resolution until EPA complied with the court's new constitutional rule. (App. 4.) The court's decision threatens to turn this rulemaking into an endless, iterative process in which the agency must seek serial judicial approval of its standards. This places the states in the untenable position of trying to respond to complex standards that may, or may not, be undone by the next round of judicial review.

B. The Implications for Public Health Are Enormous.

In 1997, EPA found that the existing standards for PM and ozone were inadequate to protect the public health. Indeed, it concluded that if the existing standards were left in place, as many as 15,000 people would die prematurely, and hundreds of thousands more would fall ill, experience respiratory problems, miss work or school, and/or be admitted to the hospital, *every year*. These factual findings were reached after multiple exchanges between EPA and CASAC regarding the latest scientific evidence of the public health effects of PM and ozone. Because the court of appeals struck down the NAAQS and never disputed these factual findings, the enormous public health consequences of that ruling cannot now be gainsaid.

C. A Direct Circuit Conflict Is Impossible.

The absence of a direct circuit conflict does not counsel against this Court's review. Judicial review of nationally applicable regulations promulgated under the Clean Air Act is available exclusively in the D.C. Circuit. 42 U.S.C. §

7607(b)(1). Thus a circuit split will never develop as to the constitutional and statutory questions presented here. Unless this Court grants review of the D.C. Circuit's decision, a panel opinion of just two judges – which a majority of the judges participating in the decision whether to rehear the case *en banc* believed sufficiently problematic to warrant *en banc* review – will govern the validity and enforceability of the national air quality program.

If allowed to stand, the two-judge ruling on delegation will control not only EPA's standards for PM and ozone, but also its standards for the other air pollutants regulated by NAAQS. The agency is just now in the process of reworking its standard for sulfur dioxide.[12] Given the monumental amount of time and resources involved in reviewing and revising NAAQS, this Court's immediate review is warranted to prevent EPA's standard-setting process from taking place under a cloud of constitutional doubt.

In reaching the question of delegation, two judges held invalid EPA's administration of what is perhaps the nation's premier environmental program on the basis of a perfunctory, one-sentence argument in two parties' briefs. This Court's review is warranted in order to give the constitutional question, and the Clean Air Act itself, the careful hearing they deserve.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12]Statement of Regulatory and Deregulatory Priorities, 64 Fed. Reg. 64,023, 64,030 (Nov. 22, 1999).

Respectfully submitted.

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App. 1

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Intervenors

Consolidated with
Nos. 97-1546, 97-1548, 97-1551, 97-1552, 97-1553, 97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567, 97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579, 97-1583, 97-1583, 97-1586, 97-1587, 97-1588, 97-1592, 97-1594, 97-1596, 97-1597, 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Intervenors

Consolidated with

App. 2

Nos. 97-1502, 97-1505, 97-1508, 97-1509, 97-1510, 97-1512, 97-1513, 97-1514, 97-1518, 97-1519, 97-1526, 97-1531, 97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575, 97-1584, 97-1589, 97-1591, 97-1595, 97-1619

On Petitions for Review of an Order of the Environmental Protection Agency

United States Court of Appeals, District of Columbia Circuit

Argued December 17, 1998. Decided May 14, 1999.

Before WILLIAMS, GINSBURG, and TATEL, *Circuit Judges*. TATEL, *Circuit Judge*, concurring in part and dissenting in part.

* Judge Williams wrote Parts I and III.B; Judge Ginsburg wrote Parts II, III.A, and IV.D; Judge Tatel wrote Parts IV.A-C.

PER CURIAM:

Introduction

The Clean Air Act requires EPA to promulgate and periodically revise national ambient air quality standards ("NAAQS") for each air pollutant identified by the agency as meeting certain statutory criteria. See Clean Air Act §§ 108-09, 42 U.S.C. §§ 7408-09. For each pollutant, EPA sets a "primary standard"--a concentration level "requisite to protect the public health" with an "adequate margin of safety"--and a "secondary standard"--a level "requisite to protect the public welfare." Id. § 7409(b).

In July 1997 EPA issued final rules revising the primary and secondary NAAQS for particulate matter ("PM") and ozone. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (1997) ("PM Final Rule"); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (1997) ("Ozone Final Rule"). Numerous petitions for review have been filed for each rule.

In Part I we find that the construction of the Clean Air Act on which EPA relied in promulgating the NAAQS at issue here effects an unconstitutional delegation of legislative power. See U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States."). We remand the cases for EPA to develop a construction of the act that satisfies this constitutional requirement.

In Part II we reject the following claims: that § 109(d) of the Act allows EPA to consider costs; that EPA should have considered the environmental damage likely to result from the NAAQS' financial impact on the Abandoned Mine Reclamation Fund; that the NAAQS revisions violated the National Environmental Policy Act ("NEPA"), Unfunded Mandates Reform Act ("UMRA"), and Regulatory Flexibility Act ("RFA").

In Part III we decide two ozone-specific statutory issues, holding that the 1990 revisions to the Clean Air Act limit EPA's ability to enforce new ozone NAAQS and that EPA cannot ignore the possible health benefits of ozone.

Finally, in Part IV we resolve various challenges to the PM NAAQS. We agree with petitioners that EPA's choice of PM_{10} as the indicator for coarse particulate matter was arbitrary and capricious; we reject petitioners' claims that EPA must treat $PM_{2.5}$ as a "new pollutant," that EPA must identify a biological

mechanism explaining PM's harmful effects, and that the Clean Air Act requires secondary NAAQS to be set at levels that eliminate all adverse visibility effects.

The remaining issues cannot be resolved until such time as EPA may develop a constitutional construction of the act (and, if appropriate, modify the disputed NAAQS in accordance with that construction).

I. Delegation

Certain "Small Business Petitioners" argue in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power. We agree. Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from the statute. The nondelegation doctrine requires such a principle. See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S. Ct. 348 (1928). Here it is as though Congress commanded EPA to select "big guys," and EPA announced that it would evaluate candidates based on height and weight, but revealed no cut-off point. The announcement, though sensible in what it does say, is fatally incomplete. The reasonable person responds, "How tall? How heavy?"

EPA regards ozone definitely, and PM likely, as nonthreshold pollutants, i.e., ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero. See Ozone Final Rule, 62 Fed. Reg. at 38,863/3 ("Nor does it seem possible, in the Administrator's judgment, to identify [an ozone concentration] level at which it can be concluded with confidence that no 'adverse' effects are

likely to occur."); National Ambient Air Quality Standards for Ozone and Particulate Matter, 61 Fed. Reg. 65,637, 65,651/3 (1996) (proposed rule) ("The single most important factor influencing the uncertainty associated with the risk estimates is whether or not a threshold concentration exists below which PM-associated health risks are not likely to occur."). For convenience, we refer to both as non-threshold pollutants; the indeterminacy of PM's status does not affect EPA's analysis, or ours.

Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero. Section 109(b)(1) says that EPA must set each standard at the level "requisite to protect the public health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). These are also the criteria by which EPA must determine whether a revision to existing NAAQS is appropriate. See 42 U.S.C. § 7409(d)(1) (EPA shall "promulgate such new standards as may be appropriate in accordance with ... [§ 7409(b)]"); see also infra Part II.A. For EPA to pick any non-zero level it must explain the degree of imperfection permitted. The factors that EPA has elected to examine for this purpose in themselves pose no inherent nondelegation problem. But what EPA lacks is any determinate criterion for drawing lines. It has failed to state intelligibly how much is too much.

We begin with the criteria EPA has announced for assessing health effects in setting the NAAQS for non-threshold pollutants.[1] They are "the nature and severity of the health

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[1]Technically, EPA describes the criteria as used only for setting the "adequate margin of safety." There might be thought to be a separate step in which EPA determines what standard would protect public health without any margin of safety, and that step might be governed by different criteria. But EPA did

effects involved, the size of the sensitive population(s) at risk, the types of health information available, and the kind and degree of uncertainties that must be addressed." Ozone Final Rule, 62 Fed. Reg. at 38,883/2; EPA, "Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information: OAQPS Staff Paper," at II-2 (July 1996) ("PM Staff Paper") (listing same factors). Although these criteria, so stated, are a bit vague, they do focus the inquiry on pollution's effects on public health. And most of the vagueness in the abstract formulation melts away as EPA applies the criteria: EPA basically considers severity of effect, certainty of effect, and size of population affected. These criteria, long ago approved by the judiciary, see Lead Industries Ass'n v. EPA, 208 U.S. App. D.C. 1, 647 F.2d 1130, 1161 (D.C. Cir. 1980) ("Lead Industries"), do not themselves speak to the issue of degree.

Read in light of these factors, EPA's explanations for its decisions amount to assertions that a less stringent standard would allow the relevant pollutant to inflict a greater quantum of harm on public health, and that a more stringent standard would result in less harm. Such arguments only support the intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is "requisite" or not requisite to "protect the public health" with an "adequate margin of safety," the formula set out by § 109(b)(1).

Consider EPA's defense of the 0.08 ppm level of the ozone NAAQS. EPA explains that its choice is superior to

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not use such a process, and it need not. See NRDC v. EPA, 284 U.S. App. D.C. 136, 902 F.2d 963, 973 (D.C. Cir. 1990). Thus, the criteria mentioned in the text govern the whole standard-setting process.

retaining the existing level, 0.09 ppm, because more people are exposed to more serious effects at 0.09 than at 0.08. See Ozone Final Rule, 62 Fed. Reg. at 38,868/1. In defending the decision not to go down to 0.07, EPA never contradicts the intuitive proposition, confirmed by data in its Staff Paper, that reducing the standard to that level would bring about comparable changes. See EPA, "Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information: OAQPS Staff Paper," at 156 (June 1996) ("Ozone Staff Paper"). Instead, it gives three other reasons. The principal substantive one is based on the criteria just discussed:

> The most certain O_3-related effects, while judged to be adverse, are transient and reversible (particularly at O_3 exposures below 0.08 ppm), and the more serious effects with greater immediate and potential long-term impacts on health are less certain, both as to the percentage of individuals exposed to various concentrations who are likely to experience such effects and as to the long-term medical significance of these effects.

Ozone Final Rule, 62 Fed. Reg. at 38,868/2.

In other words, effects are less certain and less severe at lower levels of exposure. This seems to be nothing more than a statement that lower exposure levels are associated with lower risk to public health. The dissent argues that in setting the standard at 0.08, EPA relied on evidence that health effects occurring below that level are "transient and reversible," Dissent at 5, evidently assuming that those at higher levels are not. But the EPA language quoted above does not make the categorical distinction the dissent says it does, and it is far from apparent that any health effects existing above the level are permanent or irreversible.

In addition to the assertion quoted above, EPA cited the consensus of the Clean Air Scientific Advisory Committee ("CASAC") that the standard should not be set below 0.08. That body gave no specific reasons for its recommendations, so the appeal to its authority, also made in defense of other standards in the PM Final Rule, see PM Final Rule, 62 Fed. Reg. at 38,677/2 (daily fine PM standard); id. at 38,678/3 (annual coarse PM standard); id. at 38,679/1 (daily coarse PM standard), adds no enlightenment. The dissent stresses the undisputed eminence of CASAC's members, Dissent at 4, but the question whether EPA acted pursuant to lawfully delegated authority is not a scientific one. Nothing in what CASAC says helps us discern an intelligible principle derived by EPA from the Clean Air Act.

Finally, EPA argued that a 0.07 standard would be "closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O_3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources." Ozone Final Rule, 62 Fed. Reg. at 38,868/3. But a 0.08 level, of course, is also closer to these peak levels than 0.09.

The dissent notes that a single background observation fell between 0.07 and 0.08, and says that EPA's decision "ensured that if a region surpasses the ozone standard, it will do so because of controllable human activity, not uncontrollable natural levels of ozone." Dissent at 6. EPA's language, coupled with the data on background ozone levels, may add up to a backhanded way of saying that, given the national character of the NAAQS, it is inappropriate to set a standard below a level that can be achieved throughout the country without action affirmatively extracting chemicals from nature. That may well be a sound reading of the statute, but EPA has not explicitly adopted it.

EPA frequently defends a decision not to set a standard at a lower level on the basis that there is greater uncertainty that health effects exist at lower levels than the level of the standard. See Ozone Final Rule, 62 Fed. Reg. at 38,868/2; PM Final Rule, 62 Fed. Reg. at 38,676/3 (annual fine PM standard); id. at 38,677/2 (daily fine PM standard). And such an argument is likely implicit in its defense of the coarse PM standards. See PM Final Rule, 62 Fed. Reg. at 38,678/3- 79/1. The dissent's defense of the fine particulate matter standard cites exactly such a justification. See Dissent at 6 ("The Agency explained that 'there is generally greatest statistical confidence in observed associations ... for levels at and above the mean concentration [in certain studies]' ") (emphasis added in dissent). But the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does.

The arguments EPA offers here show only that EPA is applying the stated factors and that larger public health harms (including increased probability of such harms) are, as expected, associated with higher pollutant concentrations. The principle EPA invokes for each increment in stringency (such as for adopting the annual coarse particulate matter standard that it chose here)--that it is "possible, but not certain" that health effects exist at that level, see PM Final Rule, 62 Fed. Reg. at 38,678/3 [2] --could as easily, for any non-threshold

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[2]EPA did cite qualitative evidence for further support for its annual standard, and argued that the evidence "does not provide evidence of effects below the range of 40-50 Sg/m3," the standard level. PM Final Rule, 62 Fed. Reg. at 38,678/3. The referenced document, however, bears no indication that the qualitative evidence demonstrates effects at the level of the standard, either. See EPA, "Air Quality Criteria for Particulate Matter," at 13-79 (April 1996).

pollutant, justify a standard of zero. The same indeterminacy prevails in EPA's decisions not to pick a still more stringent level. For example, EPA's reasons for not lowering the ozone standard from 0.08 to 0.07 ppm--that "the more serious effects ... are less certain" at the lower levels and that the lower levels are "closer to peak background levels," see Ozone Final Rule, 62 Fed. Reg. at 38,868/2--could also be employed to justify a refusal to reduce levels below those associated with London's "Killer Fog" of 1952. In that calamity, very high PM levels (up to 2,500 Sg/m3) are believed to have led to 4,000 excess deaths in a week.[3] Thus, the agency rightly recognizes that the question is one of degree, but offers no intelligible principle by which to identify a stopping point.

The latitude EPA claims here seems even broader than that OSHA asserted in International Union, UAW v. OSHA ("Lockout/Tagout I"), 291 U.S. App. D.C. 51, 938 F.2d 1310, 1317 (D.C. Cir. 1991), which was to set a standard that would reduce a substantial risk and that was not infeasible. In that case, OSHA thought itself free either to "do nothing at all" or to "require precautions that take the industry to the brink of ruin," with "all positions in between ... evidently equally valid." Id. Here, EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart--the maximum stringency would send industry not just to the brink of ruin but hurtling over it, while the minimum stringency may be close to doing nothing at all.

In Lockout/Tagout I certain special conditions that have justified an exceptionally relaxed application of the nondelegation doctrine were absent, 938 F.2d at 1317-18, and they are equally absent here. The standards in question affect

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[3]See W.P.D. Logan, "Mortality in the London Fog Incident, 1952," The Lancet, Feb. 4, 1953, at 336-38.

the whole economy, requiring a "more precise" delegation than would otherwise be the case, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553, 79 L. Ed. 1570, 55 S. Ct. 837 (1935). No "special theories" justifying vague delegation such as the war powers of the President or the sovereign attributes of the delegatee have been or could be asserted. Nor is there some inherent characteristic of the field that bars development of a far more determinate basis for decision. (This is not to deny that there are difficulties; we consider some below.)

EPA cites prior decisions of this Court holding that when there is uncertainty about the health effects of concentrations of a particular pollutant within a particular range, EPA may use its discretion to make the "policy judgment" to set the standards at one point within the relevant range rather than another. NRDC v. EPA, 284 U.S. App. D.C. 136, 902 F.2d 962, 969 (D.C. Cir. 1990); American Petroleum Inst. v. Costle, 214 U.S. App. D.C. 358, 665 F.2d 1176, 1185 (D.C. Cir. 1981); Lead Industries, 647 F.2d at 1161 (D.C. Cir. 1980). We agree. But none of those panels addressed the claim of undue delegation that we face here, and accordingly had no occasion to ask EPA for coherence (for a "principle," to use the classic term) in making its "policy judgment." The latter phrase is not, after all, a self-sufficient justification for every refusal to define limits.

It was suggested at oral argument that EPA's vision of its discretion in application of § 109(b)(1) is no broader than that asserted by OSHA after a remand by this court and upheld by this court in International Union, UAW v. OSHA ("Lockout/Tagout II"), 308 U.S. App. D.C. 368, 37 F.3d 665 (D.C. Cir. 1994). But there, in fact, OSHA allowed itself to set only standards falling somewhere between maximum feasible stringency and some "moderate" departure from that level. 37

F.3d at 669. As our prior discussion should have indicated, here EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog.

The dissent argues that a nondelegation challenge similar to this one was rejected in South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974), and cites that case's language that "the rationality of the means can be tested against goals capable of fairly precise definition in the language of science," id. at 677. See Dissent at 2. But the action challenged in South Terminal was EPA's adoption of a plan for ending or preventing violations in Boston of already-established NAAQS, not its promulgation of the NAAQS themselves. Thus, it seems likely that the "means" were the plan's provisions--e.g., a prohibition on most new parking in the city, see 504 F.2d at 671, and the "fairly precisely defined" goals were the NAAQS themselves.

Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own. Lockout/Tagout I, 938 F.2d at 1313. Doing so serves at least two of three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily. See Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971) (Leventhal, J., for three-judge panel). And such standards enhance the likelihood that meaningful judicial review will prove feasible. See id. at 759. A remand of this sort of course does not serve the third key function of non-delegation doctrine, to "ensure[ ] to the extent consistent with orderly governmental

administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will," Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980) ("Benzene") (Rehnquist, J., concurring). The agency will make the fundamental policy choices. But the remand does ensure that the courts not hold unconstitutional a statute that an agency, with the application of its special expertise, could salvage. In any event, we do not read current Supreme Court cases as applying the strong form of the nondelegation doctrine voiced in Justice Rehnquist's concurrence. See Mistretta v. United States, 488 U.S. 361, 377-79, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989).

What sorts of "intelligible principles" might EPA adopt? Cost-benefit analysis, mentioned as a possibility in Lockout/Tagout I, 938 F.2d at 1319-21, is not available under decisions of this court. Our cases read § 109(b)(1) as barring EPA from considering any factor other than "health effects relating to pollutants in the air." NRDC, 902 F.2d at 973; see also Lead Industries, 647 F.2d at 1148; American Lung Ass'n v. EPA, 328 U.S. App. D.C. 232, 134 F.3d 388, 389 (D.C. Cir. 1998); American Petroleum Inst., 665 F.2d at 1185 (echoing the same themes).

In theory, EPA could make its criterion the eradication of any hint of direct health risk. This approach is certainly determinate enough, but it appears that it would require the agency to set the permissible levels of both pollutants here at zero. No party here appears to advocate this solution, and EPA appears to show no inclination to adopt it.[4]

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[4]A zero-risk policy might seem to imply de-industrialization, but in fact even that seems inadequate to the task (and even if the calculus is confined to direct risks from

EPA's past behavior suggests some readiness to adopt standards that leave non-zero residual risk. For example, it has employed commonly used clinical criteria to determine what qualifies as an adverse health effect. See Ozone Staff Paper at 59-60 (using American Thoracic Society standards to determine threshold for "adverse health effect" from ozone). On the issue of likelihood, for some purposes it might be appropriate to use standards drawn from other areas of the law, such as the familiar "more probable than not" criterion.

Of course a one-size-fits-all criterion of probability would make little sense. There is no reason why the same probability should govern assessments of a risk of thousands of deaths as against risks of a handful of people suffering momentary shortness of breath. More generally, all the relevant variables seem to range continuously from high to low: the possible effects of pollutants vary from death to trivialities, and the size of the affected population, the probability of an effect, and the associated uncertainty range from "large" numbers of persons with point estimates of high probability, to small

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pollutants, as opposed to risks from the concomitant poverty). First, PM (at least) results from almost all combustion, so only total prohibition of fire or universal application of some heretofore unknown control technology would reduce manmade emissions to zero. See PM Staff Paper at IV-1. Second, the combustion associated with pastoral life appears to be rather deadly. See World Bank, World Development Report 1992: Development and the Environment 52 (1992) (noting that "biomass" fuels (i.e., wood, straw, or dung) are often the only fuels that "poor households, mostly in rural areas" can obtain or afford, and that indoor smoke from biomass burning "contributes to acute respiratory infections that cause an estimated 4 million deaths annually among infants and children.").

numbers and vague ranges of probability. This does not seem insurmountable. Everyday life compels us all to make decisions balancing remote but severe harms against a probability distribution of benefits; people decide whether to proceed with an operation that carries a 1/1000 possibility of death, and (simplifying) a 90% chance of cure and a 10% chance of no effect, and a certainty of some short-term pain and nuisance. To be sure, all that requires is a go/no-go decision, while a serious effort at coherence under § 109(b)(1) would need to be more comprehensive. For example, a range of ailments short of death might need to be assigned weights. Nonetheless, an agency wielding the power over American life possessed by EPA should be capable of developing the rough equivalent of a generic unit of harm that takes into account population affected, severity and probability. Possible building blocks for such a principled structure might be found in the approach Oregon used in devising its health plan for the poor. In determining what conditions would be eligible for treatment under its version of Medicaid, Oregon ranked treatments by the amount of improvement in "Quality Adjusted Life Years" provided by each treatment, divided by the cost of the treatment.[5] Here, of

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[5]The "quality" of various health states was determined by poll, and medical professionals determined the probabilities and durations of various health states with and without the treatment in question.

Oregon was twice forced to revise its system because the United States Department of Health & Human Services determined that the original proposal and a revision violated the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The reason given for this determination was that both versions undervalued the lives of persons with disabilities: The original plan measured quality of life according to the attitudes of the general population rather than the attitudes of persons with

disabilities. See HHS, "Analysis Under the Americans with Disabilities Act ('ADA') of the Oregon Reform Demonstration" (Aug. 3, 1992), reprinted in 9 Issues in L. & Med. 397, 410, 410 (1994). The revised plan ranked treatments leaving the patient in a "symptomatic" state lower than those leaving the patient asymptomatic, and certain disabling conditions were considered "symptoms." See Letter from Timothy B. Flanagan, Assistant Attorney General, to Susan K. Zagame, Acting General Counsel, HHS (Jan. 19, 1993), reprinted in 9 Issues in L. & Med. 397, 418, 421 (1994). The Department's determination was extensively criticized when issued. See Maxwell J. Mehlman et al., "When Do Health Care Decisions Discriminate Against Persons with Disabilities?" 22 J. Of Health Politics, Policy & L. 1385, 1390 (1997) (HHS's "decision provoked a storm of disbelief and denunciation").

We take no position on whether HHS's view was correct, or if the underlying norm also governs EPA's decisions under § 109(b)(1). An affirmative answer, however, would not seem to preclude use of some of Oregon's approach. The first step would be giving appropriate weight to the views of persons with disabilities. The second might be measuring the seriousness of a pollution-induced health effect by the absolute level of well-being that the effect brings about, not by the decrease in level that the effect causes. In other words, if the maximum well-being level is 100 and the average asthmatic whose asthma constitutes a disability has a well-being of 80 in the absence of air pollution (according to a measure that appropriately considers asthmatics' own assessments of their condition), then a response to air pollution that reduces the asthmatics' well-being to 70 could be counted as an effect of magnitude 30 (the difference from full health), rather than 10 (the difference from the level without the pollution). That approach would ensure that effects on persons with disabilities

course, EPA may not consider cost, and indeed may well find a completely different method for securing reasonable coherence. Alternatively, if EPA concludes that there is no principle available, it can so report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice.

We have discussed only the primary standards. Because the secondary standards are at least in part based on those, see Ozone Final Rule, 62 Fed. Reg. at 38,875/3-76/1; PM Final Rule, 62 Fed. Reg. at 38,680/3, we also remand the cases to the agency with regard to the secondary standards as well, for further consideration in light of this opinion.

II. Other General Claims

The petitioners and amici contend that the EPA erroneously failed to consider a host of factors in revising the PM and ozone NAAQS. We reject each of these claims in turn.

A. Consideration of Cost in Revising Standards

As this court long ago made clear, in setting NAAQS under § 109(b) of the Clean Air Act, the EPA is not permitted to consider the cost of implementing those standards. See Lead Industries, 647 F.2d at 1148 (D.C. Cir. 1980); see also NRDC, 902 F.2d at 973 (following Lead Industries in reviewing particulate matter NAAQS); American Petroleum Inst., 665 F.2d at 1185 (same, in reviewing ozone NAAQS). The petitioners make four unsuccessful attempts to distinguish Lead Industries and its progeny.

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were not underestimated, even in the broad sense of that term apparently adopted by HHS.

First, the petitioners claim that in Lead Industries we held only that the Clean Air Act does not compel the EPA to consider the costs of implementation in setting a NAAQS; on the contrary, we held that the Act precludes the EPA from doing so. See Lead Industries, 647 F.2d at 1148 ("the statute and its legislative history make clear that economic considerations play no part in the promulgation of [NAAQS]").

Second, that we decided Lead Industries prior to the Supreme Court's decision in Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) does not, as the petitioners suggest, require us to revisit the earlier case. The Lead Industries decision was made in Chevron step one terms, see id., as the post-Chevron progeny of Lead Industries have made clear. See NRDC, 902 F.2d at 973 ("Consideration of costs ... would be flatly inconsistent with the statute, legislative history and case law on this point"); NRDC v. EPA, 263 U.S. App. D.C. 166, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (in banc) ("Vinyl Chloride") ("Statute on its face does not allow consideration of technological or economic feasibility.... Congress considered the alternatives and chose to close down sources or even industries rather than to allow risks to health").

Third, though the petitioners are correct that in Lead Industries we interpreted § 109(b), which governs the setting of NAAQS, and not § 109(d), which governs the revising of NAAQS, we can discern no legally relevant difference in the two sections that would make Lead Industries inapplicable to § 109(d). Section 109(d)(1) directs the EPA to:

> complete a thorough review of the criteria published under section 7408 of this title and the [NAAQS] promulgated under this section and [to] make such revisions in such criteria and standards and promulgate

> such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section.

42 U.S.C. § 7409(d)(1). The petitioners contend that consideration of costs is one pertinent factor in determining whether revision of a NAAQS is "appropriate," but this argument ignores the clause immediately following "appropriate," which incorporates § 109(b) and thereby affirmatively precludes consideration of costs in revising NAAQS. Section 108(b), 42 U.S.C. § 7408(b), does require the EPA to provide the States with information on the cost of implementing NAAQS, but the reference to § 108 does not permit consideration of costs in setting NAAQS because it clearly relates back to the requirement that the EPA "make ... revisions in ["the criteria published under section 7408"] ... as may be appropriate." And insofar as the air quality criteria do apply to the setting of NAAQS, they do so through § 109(b), which (again) precludes the consideration of costs and which is explicitly incorporated into § 109(d)(1). See id. § 7409(b)(1) (primary NAAQS to be "based on [the air quality] criteria" issued under § 108).

Fourth, the petitioners point to § 109(d)(2), which creates the CASAC and requires it to advise the EPA about, among other things, "any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such [NAAQS]." Id. § 7409(d)(2)(C)(iv). Why, ask the petitioners, would the CASAC be required to advise the EPA about these matters if the EPA were not then supposed to consider its advice in the course of revising the NAAQS? As above, however, the petitioners overlook that § 109(d)(1) directs the EPA to review and to revise, as appropriate, the air quality standards issued under § 108 as well as the NAAQS promulgated under §

109(b). The advice required in § 109(d)(2)(C)(iv) is pertinent only to the EPA's duty under § 108 to provide the States with control strategy information.

B. Environmental Consequences of Implementing NAAQS

The State Petitioners argue that the EPA erred in failing "to consider the environmental consequences resulting from the financial impact of the [revised $PM_{2.5}$ and ozone NAAQS] on the federal Abandoned Mine Reclamation Fund Act." This argument is squarely foreclosed by our decision in NRDC. In reviewing the EPA's previous revision of the PM NAAQS, we rejected the argument that the EPA "erred in refusing to consider the health consequences of unemployment in determining the primary [NAAQS] for particulate matter" and held that "it is only health effects relating to pollutants in the air that EPA may consider." 902 F.2d at 972-73 (emphasis in original). Unlike the positive health benefits of ozone that we hold (in Part III.B, below) the EPA must consider, any detrimental health effects resulting from the financial impact upon the mine fund, like the health consequences of unemployment, are traceable to the cost of complying with the revised $PM_{2.5}$ and ozone NAAQS and not to the presence of those pollutants in the air.

C. The National Environmental Policy Act

In challenging both the revised $PM_{2.5}$ and ozone NAAQS, the State Petitioners also argue that the EPA failed to comply with certain requirements of the NEPA. The petitioners recognize that the Congress has exempted all actions under the Clean Air Act, including the setting of NAAQS, from the central requirement of the NEPA, namely, the preparation of an Environmental Impact Statement. Compare 42 U.S.C. § 4332(2)(C)-(D) (agency must prepare EIS in all "major Federal

actions significantly affecting the quality of the human environment"), with 15 U.S.C. § 793(c)(1) ("No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the [NEPA]"). Nonetheless, they suggest that the EPA is required to complete the functional equivalent of an EIS and also to comply with other requirements in the NEPA, see 42 U.S.C. § 4332(2)(B), (E), (G). State Petitioners' PM Brief at 20; State Petitioners' Ozone Brief at 19. We reject each of these suggestions.

First, the State Petitioners contend that this court has "recognized that the '[CAA], properly construed, requires the functional equivalent of a NEPA impact statement,' " id. (quoting Portland Cement Ass'n v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375, 384 (1973)). Our decision in Portland Cement, however, actually construed only "section 111 of the Clean Air Act." By replacing these words with "[CAA]" in their briefs, the petitioners misrepresent our interpretation of a single section of the Clean Air Act, dealing with emission standards for stationary sources, as an interpretation of the entire Act. Even if the petitioners were correct, however, Portland Cement predated, and is now superseded by, the statutory exemption in 15 U.S.C. § 793(c)(1), which the Congress added in 1974.

Second, the State Petitioners contend that a provision of the NEPA "requires that EPA weigh 'economic considerations.' " The section to which the petitioners refer reads as follows: "all agencies of the Federal Government shall ... identify and develop methods and procedures ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. § 4332(2)(B). Even if this section is properly read generally to require an agency to consider implementation costs, § 109(d)(1)

specifically prohibits the EPA from doing so. And the NEPA provides that it shall not "in any way affect the specific statutory obligations of any Federal agency ... to comply with criteria or standards of environmental quality." 42 U.S.C. § 4334(1). Therefore, § 4332(2)(B) cannot require the EPA to disregard the prohibition in § 109(d)(1) upon the consideration of costs in setting NAAQS.

The State Petitioners' remaining arguments--that the EPA failed to comply with two other sections of the NEPA--fare little better. Section 4332(2)(E) requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." As with § 4332(2)(B), insofar as § 4332(2)(E) can be read to require the EPA to consider the costs of implementing NAAQS when revising those standards, contrary to the prohibition in § 109(d)(1), § 4334(1) prevents it from having any effect.

If, on the other hand, § 4332(2)(E) is understood in the context of the Clean Air Act to require the EPA merely to discuss implementation alternatives, then it, like the similar § 4332(2)(G) with which the petitioners also claim the EPA failed to comply, is the functional equivalent of § 108(b)(1). That section requires the EPA to provide the States with, among other things, "such data as are available on available technology and alternative methods of prevention and control of air pollution." As we recognize with regard to the requirement that the agency prepare an EIS, "compliance with NEPA's ... requirements has not been considered necessary when the agency's organic legislation mandates procedures for considering the environment that are 'functional equivalents' of the [NEPA's] process." Izaak Walton League of Am. v. Marsh, 210 U.S. App. D.C. 233, 655 F.2d 346, 367 n.51 (1981). The

rationale for the functional equivalence doctrine is the well-established principle that a "general statutory rule usually does not govern unless there is no more specific rule." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989); see also Alabama ex rel. Siegelman v. EPA, 911 F.2d 499, 504-05 (11th Cir. 1990) (citing cases). The NEPA is the general statute requiring agencies to consider environmental harms, whereas the Clean Air Act is the more specific and its equivalent provisions apply in place of those in the NEPA. See Portland Cement, 486 F.2d at 386 (finding functional equivalence when more specific statute strikes "workable balance between some of the advantages and disadvantages of full application of NEPA").

Our analysis of the petitioners' contentions leads us to conclude that nothing in the NEPA requires the EPA in setting NAAQS to consider or to discuss matters that the Clean Air Act does not already permit or require.

D. The Unfunded Mandates Reform Act

The State Petitioners in the particulate matter case and Congressman Bliley in the ozone case both contend that the EPA is required by the Unfunded Mandates Reform Act, 2 U.S.C. § 1501 et seq., to prepare a Regulatory Impact Statement (RIS) when setting a NAAQS, see id. § 1532, and to choose the least burdensome from a range of alternative permissible NAAQS, see id. § 1535. Even if the petitioners and the amicus are correct regarding the interaction of the UMRA and the CAA--a point the EPA strongly contests-we can provide them with no relief. See id. § 1571(a)(3) ("The inadequacy or failure to prepare [a RIS] ... shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting [an] agency rule"); id. § 1571(b) ("Except as provided in [§ 1571(a), which does not mention § 1535,] ... any compliance or noncompliance

with the provisions of this chapter ... shall not be subject to judicial review; and no provision of this chapter shall be construed to [be] ... enforceable by any person in any ... judicial action").

The State Petitioners, recognizing the limitations upon judicial review in § 1571, contend that the EPA's failure to prepare a RIS can nonetheless render the NAAQS arbitrary and capricious, see 42 U.S.C. § 7607(d)(9), relying upon Thompson v. Clark, 239 U.S. App. D.C. 179, 741 F.2d 401 (D.C. Cir. 1984). In that case, we interpreted a statute that, like the UMRA, both specified that the RIS be included in the record for judicial review and precluded judicial review of an agency's compliance with the RIS requirement. We held that a "reviewing court will consider the contents of the [RIS], along with the rest of the record, in assessing not the agency's compliance with the [requirement to prepare the RIS], but the validity of the rule under other provisions of law." 741 F.2d at 405. No information in a RIS, however, could lead us to conclude that the EPA improperly set the PM and ozone NAAQS; the only information such a statement would add to the rulemaking record for a NAAQS would pertain to the costs of implementation, see 2 U.S.C. § 1532(a), and the EPA is precluded from considering those costs in setting a NAAQS. Accordingly, the failure to prepare a RIS does not render the NAAQS arbitrary and capricious.

E. The Regulatory Flexibility Act

In both the ozone and particulate matter cases, the Small Business Petitioners argue that the EPA improperly certified that the revised NAAQS would not have a significant impact upon a substantial number of small entities. The Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act, Pub.

L. No. 104-121, tit. II, 110 Stat. 857-74 ("SBREFA"), requires an agency, when engaging in notice and comment rulemaking, to "prepare and make available for public comment an initial regulatory flexibility analysis.... [that] describes the impact of the proposed rule on small entities," 5 U.S.C. § 603(a), including small businesses, small organizations, and small governmental jurisdictions, see id. § 601(6). When promulgating a final rule, an agency must describe "the steps ... taken to minimize the significant economic impact on small entities." Id. § 604(a)(5). According to the petitioners, if the EPA had complied with the RFA, it would likely have promulgated less stringent PM and ozone NAAQS than those actually chosen, which would have reduced the burden upon small entities.

A regulatory flexibility analysis is not required, however, if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Id. § 605(b). Further, the SBREFA made no change in the requirement that a regulatory flexibility analysis conducted pursuant to the RFA include estimates of "the number of small entities to which the proposed rule will apply" and of "the classes of small entities which will be subject to the requirement." 5 U.S.C. § 603(b)(3)-(4). We have consistently interpreted the RFA, based upon these sections, to impose no obligation upon an agency "to conduct a small entity impact analysis of effects on entities which it does not regulate." Motor & Equip. Mfrs. Ass'n v. Nichols, 330 U.S. App. D.C. 1, 142 F.3d 449, 467 & n.18 (1998).

The EPA certified that its revised NAAQS will "not have a significant economic impact on small entities within the meaning of the RFA." PM Final Rule, 62 Fed. Reg. at 38,702/2; Ozone Final Rule, 62 Fed. Reg. at 38,887/2-3. According to the

EPA, the NAAQS themselves impose no regulations upon small entities. Instead, the several States regulate small entities through the state implementation plans (SIPs) that they are required by the Clean Air Act to develop. See 42 U.S.C. § 7410. Because the NAAQS therefore regulate small entities only indirectly--that is, insofar as they affect the planning decisions of the States--the EPA concluded that small entities are not "subject to the proposed regulation." See Mid-Tex Elec. Coop., Inc. v. FERC, 249 U.S. App. D.C. 64, 773 F.2d 327, 342 (D.C. Cir. 1985); see also 773 F.2d at 343 ("Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.").

The EPA's description of the relationship between NAAQS, SIPs, and small entities strikes us as incontestable. The States have broad discretion in determining the manner in which they will achieve compliance with the NAAQS. The EPA "is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards" and cannot reject a SIP based upon its view of "the wisdom of a State's choices of emission limitations," Train v. NRDC, 421 U.S. 60, 79, 95 S. Ct. 1470, 43 L. Ed. 2d 731 (1975) (emphasis in original), or of the technological infeasibility of the plan. See Union Elec. Co. v. EPA, 427 U.S. 246, 265, 49 L. Ed. 2d 474, 96 S. Ct. 2518 (1976). Therefore, a State may, if it chooses, avoid imposing upon small entities any of the burdens of complying with a revised NAAQS. Only if a State does not submit a SIP that complies with § 110, 42 U.S.C. § 7410, must the EPA adopt an implementation plan of its own, which would require the EPA to decide what burdens small entities should bear. The agency has stated, however, that it will do a regulatory flexibility analysis before adopting an implementation plan of its own, as it did in 1994 when proposing such a plan for Los Angeles. See Ozone Final Rule,

62 Fed. Reg. at 38,891/1; PM Final Rule, 62 Fed. Reg. at 38,705/3.

The responses of the Small Business Petitioners do not persuade us to reject the EPA's argument or to deviate from our holdings in Mid-Tex and its progeny. First, the Small Business Petitioners contend that we must defer to the Small Business Administration's interpretation of the Act, as expressed in a letter to the EPA from the SBA's Chief Counsel for Advocacy, that the NAAQS do impose requirements upon small entities. The SBA, however, neither administers nor has any policymaking role under the RFA; at most its role is advisory. See, e.g., 5 U.S.C. §§ 601(3), 602(b), 603(a), 605(b), 609(b)(1), 612. Therefore, we do not defer to the SBA's interpretation of the RFA. See Scheduled Airlines Traffic Offices, Inc. v. Department of Defense, 318 U.S. App. D.C. 347, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (no Chevron deference owed to agency interpretation of statute it does not administer). Nor do we defer to the EPA's interpretation of the RFA, for it does not administer the Act either. We do, however, find the EPA's interpretation of the statute persuasive.

Second, the Small Business Petitioners argue that the EPA cannot claim both that the NAAQS will have no effect upon small entities and that it will have positive health effects. Clearly, however, the EPA can maintain that the NAAQS will have health effects because the Clean Air Act empowers the agency to ensure that such benefits accrue; and it can maintain that the NAAQS will not directly affect small entities because it has no authority (short of imposing its own implementation plan upon a non-complying state) to impose any burdens upon such entities.

Third, the Small Business Petitioners attempt to distinguish the possible effects upon small entities in this case

from the indirect effects that, as we found in Mid-Tex, are not within the contemplation of the RFA. But Mid-Tex is not so easily distinguished. The petitioners in that case argued that the RFA required the FERC to consider economic effects not only upon regulated industries but also upon the small entities that are their wholesale customers, even though the customers were not directly regulated by the FERC. We rejected that argument, finding a "clear indication" in the language of § 603 that the RFA is "limited to small entities subject to the proposed regulation." Mid-Tex, 773 F.2d at 342; see also Motor & Equip. Mfrs. Ass'n, 142 F.3d at 467 n.18 ("The RFA itself distinguishes between small entities subject to an agency rule, to which its requirements apply, and those not subject to the rule, to which the requirements do not apply."); United Distribution Cos. v. FERC, 88 F.3d 1105, 1170 (1996) (regulatory flexibility analysis provision applies only to "small entities that are subject to the requirements of the rule") (emphasis in original). That the Clean Air Act requires the States to submit SIPs that will achieve compliance with the NAAQS does not, in view of the States' nearly complete discretion to determine which entities will bear the burdens of a revised NAAQS, make such small entities as the SIPs may regulate any more subject to the EPA's regulation than were the wholesalers in Mid-Tex subject to regulation by the FERC.

Finally, the Small Business Petitioners suggest that the Congress in enacting the SBREFA overruled our prior interpretation of the RFA in Mid-Tex and its progeny. The SBREFA made a number of changes in the RFA, but it did not change anything in § 603 upon which we relied in Mid- Tex. And although the Congress made a slight modification in § 605(b), we do not understand it to alter our analysis in Mid-Tex. Prior to 1996, § 605(b) required an agency to provide "a succinct statement explaining the reasons" for its certification that the promulgated rule would not have a

significant economic impact upon small entities. That section now requires "a statement providing the factual basis for such certification." Our decision in Mid-Tex contemplates that an agency may justify its certification under the RFA upon the "factual basis" that the rule does not directly regulate any small entities. Nothing in the change to § 605(b) suggests that basis for certification is no longer permissible. (Indeed, the section of the statute amending § 605(b) is labeled "Technical and Conforming Amendments," see SBREFA § 243, 110 Stat. at 866.) We therefore conclude that the EPA properly certified that its NAAQS would not have a significant impact upon a substantial number of small entities.

III. Ozone

A. Subpart 2 and the Revised Ozone Standard

In 1990 the Congress substantially revised the Clean Air Act by, among other things, adding specific enforcement provisions for carbon monoxide, particulate matter, sulfur oxides, nitrogen dioxide, lead, and as pertinent here, ozone. Previously, the Act required that all areas of the country not attaining the primary ozone standard, no matter how far from attainment, come into compliance "as expeditiously as practicable but not later than December 31, 1987." 42 U.S.C. § 7502 (1988). Many areas had not attained the primary ozone NAAQS by that date; some were still a long way from doing so. The Congress responded to the continued ozone problem by enacting a new enforcement scheme, which it codified as Subpart 2 of Part D of the Clean Air Act, 42 U.S.C. §§ 7511-7511f, redesignating the original provisions as Subpart 1.

Subpart 2 requires the EPA to classify nonattainment areas based upon their design value, which is a rough measure of whether an area complies with the 0.12 ppm, 1-hour primary

ozone standard.[6] A table in Subpart 2, set out here in the margin,[7] establishes classifications ranging from marginal to

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[6]More specifically, the design value is the fourth-highest daily maximum ozone concentration in an area over three consecutive years for which there are sufficient data. If that value is less than or equal to 0.12 ppm, then an area will have only three expected values above that level and it will be in attainment with the ozone NAAQS. See EPA, The Clean Air Act Ozone Design Value Study: Final Report 1-1 to 1-22 (1994) (filed pursuant to 42 U.S.C. § 7511b(g), which required the EPA to conduct "a study of whether the [existing design value] methodology ... provides a reasonable indicator of the ozone air quality of ozone nonattainment areas"; the EPA concluded it did).

[7]This table appears in Clean Air Act § 181(a)(1), 42 U.S.C. § 7511(a)(1):

TABLE 1

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

The Severe Area category is later subdivided, creating a sixth classification for ozone nonattainment areas. See id. § 7511(a)(2) ("Notwithstanding table 1, [for] a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the

extreme, and provides an attainment date for each class. See id. § 7511(a)(1)-(2). Subpart 2 also specifies, for each class of nonattainment areas, both measures that the States must take to reduce emissions of the chemicals that are precursors of ozone and information that the States must report to the EPA. See id. § 7511a. In short, Subpart 2 is the Congress's comprehensive plan for reducing ozone levels throughout the country.

The State and Non-State Petitioners, along with Congressman Bliley appearing as an amicus curiae, argue that Subpart 2 precludes the EPA from revising the primary and secondary ozone NAAQS. We reject this argument (in Part III.A.1) insofar as it pertains to the EPA's continued ability to promulgate a revised ozone NAAQS or to designate areas as not in attainment with a revised NAAQS. We agree (in Part III.A.2) with those petitioners, however, insofar as they maintain, based upon the text and structure of Subparts 1 and 2, that the EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with the classifications, attainment dates, and control measures set out in Subpart 2. Further, we conclude (in Part III.A.3) that the EPA may not require a State to comply with a revised secondary ozone NAAQS in any area that has yet to attain the 0.12 ppm primary standard.

1. The EPA's Power to Revise the Ozone NAAQS and Designate Areas as Nonattainment

The 1990 amendments did not alter the section of the Clean Air Act that provides for setting and revising primary and secondary NAAQS. See 42 U.S.C. § 7409. The Administrator, therefore, still must "at five-year intervals [from December 31, 1980] ... complete a thorough review of ... the [NAAQS]

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attainment date shall be 17 years ... after November 15, 1990").

promulgated under this section and ... make such revisions in such ... standards ... as may be appropriate." Id. § 7409(d)(1). The Second Circuit held that this section continues to "set[ ] forth a bright-line rule for agency action," American Lung Ass'n v. Reilly, 962 F.2d 258, 263 (1992), and we agree. Nothing in the Act modifies this "bright-line rule" or otherwise makes it inapplicable to revision of the ozone NAAQS.

To the extent that the 1990 amendments shed any light upon this question, they suggest that the EPA retains its authority to revise the ozone NAAQS. For example, if the EPA relaxes a NAAQS after enactment of the 1990 amendments, then "the Administrator shall ... promulgate requirements applicable to all areas which have not attained that [relaxed] standard as of the date of such relaxation.... [which] shall provide for controls ... not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Although two other subsections of § 172 are expressly made inapplicable to the ozone regulations in Subpart 2, see id. § 7502(a)(1)(C), (a)(2)(D), this so-called anti-backsliding provision contains no such exemption. Accordingly, as the EPA notes, this section specifically contemplates that the agency may relax its ozone NAAQS and, therefore, necessarily implies that it retains the authority to revise that NAAQS. Tellingly, neither the petitioners nor the amicus reply to this point.

The petitioners and amicus raise two other arguments to support their position that the EPA cannot alter the ozone NAAQS without the approval of the Congress. We reject both in short order.

First, the Non-State Petitioners contend that Subpart 2 renders revision of the ozone NAAQS "inappropriate" within the meaning of § 109(d)(1), which provides the EPA shall

"make such revisions in such ... standards ... as may be appropriate." 42 U.S.C. § 7409(d)(1). This argument, however, pointedly ignores the text immediately following the word "appropriate," which specifies that appropriateness is to be determined "in accordance with section 7408 ... and [§ 7409(b)]" (and which, as we read it, means exclusively in accord with those sections). See, e.g., American Methyl Corp. v. EPA, 242 U.S. App. D.C. 148, 749 F.2d 826, 835-36 (D.C. Cir. 1984). Because Subpart 2 is neither listed in § 109(d)(1) nor incorporated by reference in either § 108, id. § 7408, or § 109(b), it cannot render revision of the ozone NAAQS inappropriate.

Second, the State Petitioners and Congressman Bliley argue, based upon the classification table in § 181(a)(1), id. § 7511(a)(1), that Subpart 2 codified the 0.12 ppm ozone NAAQS and, therefore, only the Congress can promulgate a revised NAAQS. Yet not all areas designated nonattainment for ozone will have design values of 0.121 ppm or higher. In fact, this was true of areas designated nonattainment for ozone as a result of the 1990 amendments, see Ozone Final Rule, 62 Fed. Reg. at 38,884/3, at least in part because of the stringent criteria in the Clean Air Act for changing the designation of an area to attainment from nonattainment. See 42 U.S.C. 7407(d)(3)(E)(iii) (redesignation permissible only if area's attainment of NAAQS "is due to permanent and enforceable reductions in emissions"). In short, although the numbers in the classification table are based upon the 0.12 ppm ozone NAAQS, they are neither equivalent to nor a codification of the NAAQS.

Not only does the EPA, as we conclude above, retain authority to promulgate a revised ozone NAAQS; the agency is still required, "in no case later than 2 years from the date of promulgation" of a revised NAAQS, to designate areas as

attainment, nonattainment, or unclassifiable under that NAAQS. Id. § 7407(d)(1)(B). Although the 1990 amendments extended by roughly 18 months the maximum time between promulgation of a revised NAAQS and designation of nonattainment areas under that NAAQS, see 42 U.S.C. § 7407(d)(1)-(2) (1988), they made no substantive change in the EPA's authority to designate areas as nonattainment under a revised NAAQS. Therefore, we hold that the EPA retains the power to designate areas as nonattainment under a revised ozone NAAQS.

2. The EPA's Power to Enforce the Revised Ozone Standard

That the enactment of Subpart 2 does not alter the EPA's authority to revise the ozone NAAQS or to designate areas as nonattainment for ozone does not, however, compel the conclusion that Subpart 2 has no effect upon the EPA's authority to enforce a revised primary ozone NAAQS. (We consider the enforcement of secondary ozone NAAQS in Part III.A.3, below.) In fact, the text and structure of Subparts 1 and 2 suggest precisely the opposite conclusion. After designating an area as nonattainment under a NAAQS, the EPA normally looks to Subpart 1 for authority to "classify the area for the purpose of applying an attainment date." 42 U.S.C. § 7502(a)(1)-(2). The cited provisions, however, do not apply "with respect to nonattainment areas for which classifications [and attainment dates] are specifically provided under other provisions of [Part D of Subchapter 1 of the Clean Air Act]." Id. § 7502(a)(1)(C), (a)(2)(D).

The EPA argues that Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the 0.12 ppm ozone NAAQS. The State and Non-State Petitioners counter that Subpart 2 specifically

provides classifications and dates for all areas designated nonattainment under any ozone NAAQS. We agree with the petitioners.

> The pertinent provision of Subpart 2 reads as follows:
>
> (a) Classification and attainment dates for 1989 nonattainment areas. -- (1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area....

Id. § 7511(a)(1). As the petitioners note, § 107(d), 42 U.S.C. § 7407(d), specifies three different times at which an area can be designated "nonattainment for ozone": immediately following enactment of the 1990 amendments, id. § 7407(d)(4); after the EPA revises the ozone NAAQS, id. § 7407(d)(1); and when an area that was in attainment, either when the Congress enacted the 1990 amendments or when the EPA promulgated a revised ozone NAAQS, later ceases to comply, id. § 7407(d)(3). The petitioners conclude from the general reference to § 107(d) that the classifications and attainment dates in Subpart 2 apply to areas designated under §§ 107(d)(1), (3), and (4). The EPA gamely responds that the reference to § 107(d) includes only subsection (4), but we do not defer to the agency's interpretation because we find that the Congress has spoken on the "precise question at issue" and we "must give effect to the unambiguously expressed intent of Congress." Chevron U. S. A. Inc., 467 U.S. 837, 842-43 & n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We canvass the two reasons that lead us to this conclusion before returning to the EPA's argument.

First, the reference to § 107(d) in § 181(a)(1) appears to have been purposeful and not the drafting error that the EPA's interpretation implies. The Congress considered but did not adopt bills that clearly would have limited the reach of Subpart 2 to nonattainment designations made immediately following enactment of the 1990 amendments. The Senate bill contained a version of Subpart 2 that classified only those areas designated nonattainment for ozone under its equivalent of § 107(d)(4). See S. 1630, 101st Cong. §§ 101, 107, reprinted in III Legislative History of the Clean Air Act Amendments of 1990, at 4124-25, 4195 [hereinafter 1990 Legislative History]. The version of Subpart 2 in the House bill, as originally introduced, similarly referred only to designations made under its equivalent of § 107(d)(4). See H.R. 3030, 101st Cong. §§ 101(a), 103, reprinted in II 1990 Legislative History, at 3748-49, 3795-96. The House committee, however, replaced the specific reference to what is now § 107(d)(4) with a general reference to § 107(d). See H.R. Rep. No. 101-490, at 3-6, 17 (1990), reprinted in II 1990 Legislative History, at 3027-30, 3041. The Conference committee then reported the text of the House bill rather than that of the Senate. See H.R. Rep. No. 101-952, at 335 (1990), reprinted in I 1990 Legislative History, at 1785.

Second, our conclusion that the Congress intentionally referred to § 107(d) as a whole is supported by a comparison of Subparts 1 and 2. The Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring areas into attainment with the 0.12 ppm standard in the allotted time. See H.R. Rep. No. 101-490, at 145-50, reprinted in II 1990 Legislative History, at 3169-74. Rather than continue treating all ozone nonattainment areas alike, the Congress allowed the various areas between 3 and 20 years to attain the ozone NAAQS, depending upon the extent of the area's ozone problem. See id. at 146-47 ("In 1977, Congress tried to waive

[sic] a 'magic wand' and command that all nonattainment areas [for ozone] will meet the applicable [NAAQS].... by December 31, 1987. ... [That] date[ ] has come and gone and it is clear that ... we had no 'magic' solutions."), reprinted in II 1990 Legislative History, at 3170-71. As the petitioners argue, because the 1990 amendments extended the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS, they must preclude the EPA from requiring areas to comply either more quickly or with a more stringent ozone NAAQS.

Subpart 1 requires compliance with a primary NAAQS "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment." 42 U.S.C. § 7502(a)(2)(A). All nonattainment areas would have until 2012 to comply with the revised ozone NAAQS if the EPA and the States were to take the full time authorized in Subpart 1 for making attainment designations and the EPA were to approve every possible extension for each area. See id. §§ 7407(d)(1)(A)-(B), 7502(a)(2)(A), (C). Such wide discretion is inconsistent, however, with Subpart 2, in which the Congress stripped the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment (with two limited exceptions not relevant here, see id. § 7511(a)(4), (5)). Moreover, under § 181(a) of Subpart 2, Los Angeles, the nation's only Extreme Area, has until 2010 to attain the 0.12 ppm ozone NAAQS, and the possibility of extending that deadline until 2012. That Los Angeles should also have to attain a more stringent ozone standard by that same year, if not earlier, clearly runs counter to the comprehensive enforcement scheme enacted in Subpart 2.

The EPA offers two arguments against this interpretation of Subparts 1 and 2. First, the EPA contends that a recent statute confirms its power to designate nonattainment

areas under the revised ozone standard. See Pub. L. No. 105-178, § 6103(a), 112 Stat. 465 (1998) (extending time to two years from one year for governor to submit proposed designation under 0.08 ppm ozone NAAQS). That statute also specifically states, however, that "nothing in section[ ] ... 6103 shall be construed by the Administrator of Environmental Protection Agency or any court ... to affect any pending litigation or to be a ratification of the ozone ... standard[ ]." Id. § 6104. Further, even if the EPA were correct that § 6103 confirms the agency's power to designate areas under a revised ozone NAAQS, that power was never in doubt, as we concluded above. Indeed, § 6104 simply does not bear upon the question we address here: whether Subpart 1 or Subpart 2 provides the applicable enforcement mechanisms for an area designated nonattainment under a revised ozone NAAQS.

Second, the EPA argues that read in context the reference to § 107(d) in § 181(a)(1) relates only to designations made under § 107(d)(4). Because the table in § 181(a)(1) classifies areas based upon a design value that roughly measures attainment of the 0.12 ppm ozone NAAQS, the EPA contends that the nonattainment designations referenced in § 181(a)(1) are only those designations made under the 0.12 ppm ozone NAAQS. This explanation, however, does not square with either the Congress's decision not to refer to § 107(d)(4) specifically or the long-term nature of the attainment scheme enacted in Subpart 2; on the EPA's interpretation, that scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments.

The EPA points next to § 181(b)(1), which specifies the attainment dates for areas that met the 0.12 ppm standard when the Congress enacted the 1990 amendments but that later cease to comply. That section, however, applies only to areas

designated under § 107(d)(3) that previously were "designated attainment or unclassifiable for ozone under section [107(d)(4)]." That § 181(b)(1) provides special rules for such areas, but not for areas designated under § 107(d)(3) that had previously been designated attainment for ozone or unclassifiable under § 107(d)(1), does not support the EPA's argument that the phrase in § 181(a)(1) "designated nonattainment for ozone pursuant to section 107(d)" denotes only those designations made under § 107(d)(4). If anything, the specification of § 107(d)(4) in § 181(b)(1) makes its absence from § 181(a)(1) all the more striking.

The final bit of context to which the EPA points is the title of § 181(a): "Classification and attainment dates for 1989 nonattainment areas." Because the title specifies "1989 nonattainment areas," we are told, § 181(a) must refer only to nonattainment designations made immediately after enactment of the 1990 amendments, that is, designations made under § 107(d)(4). Although "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," INS v. National Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 189, 116 L. Ed. 2d 546, 112 S. Ct. 551 (1991), a title cannot be allowed to create an ambiguity in the first place. See Maguire v. Commissioner of Internal Revenue, 313 U.S. 1, 9, 61 S. Ct. 789, 85 L. Ed. 1149 (1941) ("The title of an act will not limit the plain meaning of the text."). The text of § 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d). There simply is no ambiguity in need of resolution by reference to the title of the section.

In sum, § 181(a) "specifically provides" for classifications and attainment dates for areas designated nonattainment for ozone pursuant to § 107(d)(1). Accordingly, Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under

a revised primary ozone NAAQS, see 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D), and the EPA must enforce any revised primary ozone NAAQS under Subpart 2.

3. The Secondary Ozone NAAQS

The Non-State Petitioners briefly contend that our conclusion that Subpart 2 provides the classifications and attainment dates for areas designated nonattainment under a revised primary ozone NAAQS is equally applicable to the enforcement of a revised secondary ozone NAAQS. We find it impossible to conclude, however, that Subpart 2 "specifically provides" for classifications and attainment dates for areas designated nonattainment with a revised secondary ozone NAAQS; § 181(a)(1) expressly refers only to primary NAAQS and Subpart 2 not once mentions secondary NAAQS. Further, attainment dates in Subpart 1 for secondary standards are less stringent than for primary standards, making comparison with the more lenient dates in Subpart 2 less troubling. Compare id. § 7502(a)(2)(B) (attainment of secondary NAAQS "shall be ... achieved as expeditiously as practicable after the date such area was designated nonattainment"), with id. § 7502(a)(2)(A) (attainment of primary NAAQS "shall be ... achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment"). Nonetheless, we understand Subpart 2 to codify the Congress's judgment as to what is "as expeditiously as practicable" in reducing an area's level of ozone. Consequently, the EPA is precluded from requiring any steps toward compliance with a revised secondary ozone NAAQS prior to an area's attainment of the 0.12 ppm standard. In areas that meet the 0.12 ppm standard, however, Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

B. Ozone's Health Benefits

Petitioners presented evidence that according to them shows the health benefits of tropospheric ozone as a shield from the harmful effects of the sun's ultraviolet rays--including cataracts and both melanoma and nonmelanoma skin cancers. In estimating the effects of ozone concentrations, EPA explicitly disregarded these alleged benefits.

EPA explained its decision first as a matter of statutory interpretation. Under the Clean Air Act, EPA's ambient standards for any pollutant are to be "based on [the] criteria" that EPA has published for that pollutant. 42 U.S.C. § 7409(b)(1) & (2). The "criteria," in turn, are to "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." Id. § 7408(a)(2). The reference to "all identifiable effects" would seem on its face to include beneficent effects.

EPA attempts to avoid this straightforward reading in several ways. First, it points to the term "such pollutant," arguing that the statute requires it to focus exclusively on the characteristics that make the substance a "pollutant." But the phrase "pollutant" is simply a label used to identify a substance to be listed and controlled by the statute. While it is perfectly true that a substance known to be utterly without adverse effects could not make it onto the list, this fact of nomenclature does not visibly manifest a congressional intent to banish consideration of whole classes of "identifiable effects."

EPA also relies on the fact that two of the three specified considerations under § 108(a)(2)'s general mandate refer to "adverse effects":

> The criteria for an air pollutant, to the extent practicable, shall include information on-- (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant; (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and (C) any known or anticipated adverse effects on welfare. Id. § 7408(a)(2) (emphasis added).

EPA's argument would be of uncertain force even if all three types of effects specifically required to be considered were spoken of as "adverse effects"; there is no reason to read "adverse" back into the "all identifiable effects" of § 108(a)(2). But as one of the three specified classes refers to "effects" unmodified, id. § 7408(a)(2)(A), we can reject EPA's argument without even reaching that issue. That Congress qualified "effects" in clauses (B) and (C) with "adverse" seems only to strengthen the supposition that in (A)--and in the general mandate--it intended to cover all health or welfare effects. Therefore if petitioners' contentions are right, clause (A) applies to ozone: the presence of ultraviolet radiation at various levels "alters the effects [of ozone] on public health or welfare" by making them on the whole less malign--perhaps even beneficial.

EPA next argues that Title VI of the Clean Air Act, id. §§ 7671-7671q, which mandates certain measures to preserve stratospheric ozone, represents a complete consideration of ozone's beneficial role as a UV shield. Petitioners' claim, however, is that ground-level (tropospheric) ozone--the subject of this rule--has a UV-screening function independent of the

ozone higher in the atmosphere. EPA points to nothing in the statute that purports to address tropospheric ozone.

Finally, EPA directs us towards legislative history from the 1970 and 1990 Clean Air Act Amendments. The "all identifiable effects" language, however, dates to the 1967 Amendments. Legislative history from the 1970 and 1990 Congresses cannot be "an authoritative interpretation of what the [1967] statute meant," because it is "the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." Pierce v. Underwood, 487 U.S. 552, 566, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988).

Under Chevron, we defer to an agency's interpretation of a statute if "the statute is silent or ambiguous with respect to the specific issue" and "the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. We find no such ambiguity in this case. Further, EPA's interpretation fails even the reasonableness standard of Chevron's second part: it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance. At oral argument even EPA counsel seemed reluctant to claim that the statute justified disregard of the beneficent effects of a pollutant bearing directly on the health symptoms that accounted for its being thought a pollutant at all (suppose, for example, a chemical that both impedes and enhances breathing, depending on the person or circumstances); he also seemed unable to distinguish that case from the one here--where the chemical evidently impedes breathing but provides defense against various cancers.

Legally, then, EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109. EPA's other arguments are technical, and are of two sorts: those that allegedly show petitioners' studies to be fatally flawed and those that allegedly show specific inflation of results in these studies. We need only consider the first sort, for EPA chose to give the studies no weight at all.

Petitioners rely primarily on studies by Lutter and Cupitt. EPA found that these could be ignored because the marginal benefits are difficult, if not impossible, to quantify reliably and because there is "no convincing basis for concluding that any such effects ... would be significant." But these are not the criteria by which EPA assesses adverse health effects. It does not rigorously or uniformly demand either quantifiability, see, e.g., Ozone Final Rule, 62 Fed. Reg. at 38,860/3 (admitting that "quantitative risk estimates could not be developed" for certain adverse effects of ozone on which EPA regulated); EPA Ozone Brief at 48 (defending consideration of various effects that "played an important role in the Administrator's final decision" despite absence of quantification: "EPA did not estimate the risk for such effects because 'information [was] too limited to develop quantitative estimates,'--not because there is doubt the effects occur.") (alteration and emphasis in original) (citation omitted), or any specific level of significance. As we can see no reason for imposing a higher information threshold for beneficent effects than for maleficent ones, we have no basis for affirming EPA's decision to disregard the studies.

As we said above, we are remanding to EPA to formulate adequate decision criteria for its ordinary object of analysis-ill effects. We leave it to the agency on remand to determine whether, using the same approach as it does for

those, tropospheric ozone has a beneficent effect, and if so, then to assess ozone's net adverse health effect by whatever criteria it adopts.

IV. Particulate Matter

A. PM_{10} as Coarse Particle Indicator

We now turn to petitioners' challenges to the Agency's regulation of coarse particulate pollution. Both the 1987 NAAQS and the proposed standards regulate all particles with diameters under 10 micrometers, signified by the indicator PM_{10}. The PM_{10} spectrum includes both coarse and fine particles. While the main distinction between coarse and fine particles is the process by which they are produced, EPA and epidemiologists who study the health effects of particulate pollution identify coarse and fine particles through rough approximations of those particles' diameters. Coarse particles, which become airborne usually from the crushing and grinding of solids, generally have diameters between 2.5 and 10 micrometers and can thus be identified by the indicator $PM_{10-2.5}$. Fine particles, indicated in these new NAAQS by $PM_{2.5}$, come mainly from combustion or gases and generally have diameters of 2.5 micrometers or less.

Despite EPA's conclusion that coarse and fine particles pose independent and distinct threats to public health, the Agency chose not to adopt an indicator, such as $PM_{10-2.5}$, that would measure only the coarse fraction of PM_{10}. Petitioners make two arguments: that there is no scientific basis for regulating coarse particles at all, and that even if there were, retention of the PM_{10} indicator simultaneously with the establishment of the new fine particle indicator is unsupported by evidence in the record and arbitrary and capricious. We agree with this latter argument.

Beginning with petitioners' first challenge, we think the record contains sufficient evidence to justify the Agency's decision to regulate coarse particulate pollution. While the relationship between PM_{10} pollution and adverse health effects justifying the 1987 NAAQS was well-established, see NRDC v. EPA, 284 U.S. App. D.C. 136, 902 F.2d 962, 967-68 (D.C. Cir. 1990), two studies contained in the record of these proceedings concentrated specifically on the health effects caused by the coarse fraction of PM_{10} pollution. See Mary Ellen Gordian et al., "Particulate Air Pollution and Respiratory Disease in Anchorage, Alaska," 104 Envtl. Health Persp. 290 (1996) (studying volcanic ash); Brockton J. Hefflin et al., "Surveillance for Dust Storms and Respiratory Diseases in Washington State, 1991," 49 Archives of Envtl. Health 170 (1994) (studying fugitive dust). In addition, the record contains at least nine multivariate analyses finding statistically significant relationships with health effects for both $PM_{2.5}$ and PM_{10}, suggesting that the portion of PM_{10} pollution unaccounted for by $PM_{2.5}$ (i.e., coarse particles) explains some of the observed adverse health effects. In other words, because regression analysis holds the $PM_{2.5}$ component constant, the PM_{10} effect recognized in these equations actually evidences results from coarse particulate pollution. To be sure, petitioners have pointed to some evidence to the contrary. But given that our review is limited to "ascertaining that the choices made by the Administrator were reasonable and supported by the record," and does not include "judging the merits of competing expert views," Lead Industries, 647 F.2d at 1160, we find ample support for EPA's decision to regulate coarse particulate pollution above the 1987 levels.

Having found independent health consequences from coarse particulate pollution, EPA nevertheless decided to regulate the coarse fraction of PM_{10} indirectly, using PM_{10} (which includes both coarse and fine PM) as a "surrogate for

coarse fraction particles." PM Final Rule, 62 Fed. Reg. at 38,668/2. While recognizing that $PM_{10-2.5}$ would have served as a satisfactory coarse particle indicator, EPA offers three justifications for its decision to use PM_{10} instead: (1) Both the Gordian and Hefflin studies used PM_{10}, not $PM_{10-2.5}$, as the variable in their models, (2) the PM_{10} standards will work in conjunction with the $PM_{2.5}$ standards by regulating the portion of particulate pollution not regulated by the $PM_{2.5}$ standards, and (3) a nationwide monitoring program for PM_{10} already exists. We find none of these explanations persuasive.

As to the first argument, while acknowledging that the indicator used in the studies captures both coarse and fine particles, EPA nevertheless maintains that PM_{10} is an effective indicator for the regulation of coarse particulate pollution. "Adopting the indicator used in the studies," the Agency says, "increases the likelihood that the level selected will result in the health protections predicted." But as EPA's own staff paper suggests, PM_{10} is "inherently confounded" by the presence of $PM_{2.5}$ particles, meaning that any regulation of PM_{10} pollution will include both coarse and fine particles. See PM Staff Paper at V-59. Using PM_{10} as the coarse particle indicator, instead of $PM_{10-2.5}$, will thus regulate more than just the coarse fraction of PM_{10}, and the amount of coarse particulate pollution permitted will depend (quite arbitrarily) on the amount of $PM_{2.5}$ pollution in the air. For example, assuming the 50 microgram annual PM_{10} level adopted by the Agency and a region with an annual $PM_{2.5}$ pollution level of 15 micrograms, the PM_{10} indicator would prohibit coarse particulate ($PM_{10-2.5}$) pollution from exceeding 35 micrograms. But in an area with only 5 micrograms of $PM_{2.5}$ pollution, the NAAQS would permit coarse particulate pollution to reach as high as 45 micrograms.

EPA's second argument--that the PM_{10} standard will work in conjunction with the $PM_{2.5}$ standard--suffers from the

same deficiency. Accepting EPA's finding of "profound physicochemical differences" between coarse and fine PM, PM Staff Paper at V-59, such that each requires independent regulation, we cannot discern exactly how a PM_{10} standard, instead of a $PM_{10-2.5}$ standard, will work alongside a $PM_{2.5}$ standard to regulate only the coarse fraction of PM_{10}. EPA provides no explanation to aid us in understanding its decision. In fact, as the example above indicates, it is the very presence of a separate $PM_{2.5}$ standard that makes retention of the PM_{10} indicator arbitrary and capricious. Far from working in conjunction to regulate coarse particles, PM_{10} and $PM_{2.5}$ indicators, when used together, lead to "double regulation" of the $PM_{2.5}$ component of PM_{10} and potential underregulation of the $PM_{10-2.5}$ component since the amount of $PM_{10-2.5}$ permitted will always depend on the amount of $PM_{2.5}$ in the air.

EPA's final argument is pragmatic. It maintains that PM_{10} is a better indicator than $PM_{10-2.5}$ for coarse particulate pollution because a nationwide monitoring program for PM_{10} already exists. But as EPA acknowledges elsewhere in its brief, NRDC bars EPA from considering factors unrelated to public health in setting air quality standards. Echoing our decision in Vinyl Chloride, NRDC held that "the Administrator may not consider cost and technological feasibility in determining what is 'safe'; such a determination 'must be based solely upon the risk to health.' " NRDC, 902 F.2d at 973 (quoting "Vinyl Chloride", 263 U.S. App. D.C. 166, 824 F.2d 1146, 1166 (D.C. Cir. 1990) (in banc)); see also American Petroleum Inst. v. Costle, 214 U.S. App. D.C. 358, 665 F.2d 1176, 1185 (D.C. Cir. 1981); Lead Industries, 647 F.2d at 1148-55. The administrative convenience of using PM_{10} cannot justify choosing an indicator poorly matched to the relevant pollution agent.

In view of our conclusion that PM_{10} amounts to an arbitrary indicator for coarse particle pollution, we need not address petitioners' separate challenge to the PM_{10} levels or secondary standards. We note, however, that whatever levels the Agency ultimately selects for coarse particle pollution will need to comply with the requirements set forth in Part I of this opinion.

B. Fine Particles as "New Pollutant"

The Attorneys General of Ohio, Michigan, and West Virginia ("state petitioners") argue that EPA is regulating $PM_{2.5}$ for the first time. Because they consider $PM_{2.5}$ to be a "new pollutant," they argue that § 108 of the Clean Air Act requires EPA to conduct further research on $PM_{2.5}$'s health effects before listing it as a pollutant, to issue an air quality criteria document reflecting the latest science on the health effects of the pollutant, and to assist states by developing "data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology." 42 U.S.C. § 7408(b)(1).

Although EPA never responds to this argument, five northeastern states (as respondent intervenors and amici) do. Pointing out that previous NAAQS have always included $PM_{2.5}$, these attorneys general support the EPA's decision not to list $PM_{2.5}$ separately as a new pollutant. We agree.

The state petitioners cannot escape the fact that the original standards for particulate pollution using Total Suspended Particulates (TSP) as indicator, as well as the 1987 NAAQS that used PM_{10}, included by definition every particle 2.5 micrometers and smaller. Moreover, in some areas fine particles often dominate PM_{10} pollution. See PM Staff Paper at V-63. By refining the NAAQS to focus on smaller particles that

EPA found posed distinct threats to public health, EPA has done with these regulations exactly what we held it could do in 1987 when it made the change from Total Suspended Particulates to PM_{10}. See NRDC, 902 F.2d at 965-66. EPA's decision to update the NAAQS to focus on $PM_{2.5}$ merely continues a trend based on evolving science. It does not violate the provisions of § 108 of the Clean Air Act.

C. Failure to Identify a Biological Mechanism for Particulate Pollution's Relationship to Adverse Health Effects

Also challenging the establishment of a fine particle standard, non-state petitioners argue that EPA failed to explain the biological mechanism through which particulate pollution causes adverse health effects. Even if epidemiological studies show robust statistical relationships between pollution and health effects, they say, the absence of proof of causation-i.e., how particles actually interact with cells and organs to cause sickness and death--is fatal to the standard. We disagree.

To begin with, the statute itself requires no such proof. The Administrator may regulate air pollutants "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A) (1994) (emphasis added). Moreover, this court has never required the type of explanation petitioners seek from EPA. In fact, we have expressly held that EPA's decision to adopt and set air quality standards need only be based on "reasonable extrapolations from some reliable evidence." NRDC v. Thomas, 256 U.S. App. D.C. 310, 805 F.2d 410, 432 (D.C. Cir. 1986). Indeed, were we to accept petitioners' view, EPA (or any agency for that matter) would be powerless to act whenever it first recognizes clear trends of mortality or morbidity in areas dominated by a particular pathogen.

The numerous epidemiological studies appearing in this record, some of which EPA also used to support the 1987 NAAQS, easily satisfy the standard articulated in the statute and emphasized repeatedly in decisions of this court. Covering diverse geographic locations with widely varying mixes of air pollution, the studies found statistically significant relationships between air-borne particulates signified by a variety of indicators and adverse health effects. Given EPA's statutory mandate to establish standards based on "the latest scientific knowledge," 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards.

D. Visibility Effects

The Environmental Petitioners challenge the EPA's decision to set the secondary $PM_{2.5}$ NAAQS at levels equivalent to the primary NAAQS. According to the petitioners, the EPA's failure to set the secondary NAAQS at more stringent levels will result in "adverse visibility impacts" in parts of the country. In view of our conclusion in Part I, above, that the EPA has not adequately explained the principles upon which it relied in setting the levels in the NAAQS for PM, we need not reach the main thrust of the petitioners' challenge to the secondary NAAQS. On the other hand, the Environmental Petitioners have also raised a question of statutory interpretation, the resolution of which should assist the EPA if it revisits its decision to set the secondary $PM_{2.5}$ NAAQS.

In the PM Final Rule, the EPA decided "to address the welfare effects of PM on visibility by setting secondary standards identical to the suite of $PM_{2.5}$ primary standards, in conjunction with the establishment of a regional haze program under § 169A of the Act." PM Final Rule, 62 Fed. Reg. at

38,679/3. Section 169A "declares as a national goal the prevention ... and the remedying of any ... impairment of visibility in mandatory class I Federal areas ... resulting from manmade air pollution." 42 U.S.C. § 7491. Mandatory class I areas include all international parks, and national parks and wilderness areas of a certain size. See 42 U.S.C. § 7472(a). The EPA concluded that reduction of $PM_{2.5}$ levels in class I areas would benefit the surrounding areas as well because "the same haze that degrades visibility within or looking out from a national park also degrades visibility outside it." PM Final Rule, 62 Fed. Reg. at 38,682/1.

The Environmental Petitioners argue that § 109(b)(2), 42 U.S.C. § 7409(b)(2), requires the EPA to set secondary NAAQS at a level sufficient to eliminate all adverse visibility effects and that it leaves the EPA no discretion to decide that some visibility impairment is better remedied through another program. This argument must be wrong. For, as the EPA argues, the Congress required the EPA to implement a regional haze program specifically in order to address adverse visibility effects that persist in class I areas after attainment of the secondary NAAQS. See 42 U.S.C. § 7470(1) (purpose of this part of Clean Air Act is "to protect public ... welfare from any actual or potential adverse effect which ... may reasonably be anticipated to occur ... notwithstanding attainment and maintenance of all [NAAQS]"). Accordingly, we conclude that the Congress did not intend the secondary NAAQS to eliminate all adverse visibility effects and, therefore, that the EPA acted within the scope of its authority in deciding to rely upon the regional haze program to mitigate some of the adverse visibility effects caused by $PM_{2.5}$.

Conclusion

We remand the cases to EPA for further consideration of all standards at issue. We do not vacate the new ozone standards because the standard is unlikely to engender costly compliance activities in light of our determination that it cannot be enforced by virtue of Clean Air Act § 181(a), 42 U.S.C. § 7511(a). We vacate the challenged coarse particulate matter standards because EPA will have to develop different standards when it corrects the arbitrarily chosen PM_{10} indicator. As to the fine particulate matter standards, we invite briefing on the question of remedy: possibilities include but are not limited to vacatur, non-vacatur subject to application to vacate, and non-vacatur.[8] An order giving the briefing particulars will follow.

Because of the substantial investment of time this matter has required and the many unresolved issues bearing on application of whatever standards may emerge, this panel will in the interest of judicial economy retain jurisdiction over the cases following remand. See Sierra Club v. Gorsuch, 230 U.S. App. D.C. 179, 715 F.2d 653, 661 (D.C. Cir. 1983).

TATEL, Circuit Judge, dissenting from Part I:

The Clean Air Act has been on the books for decades, has been amended by Congress numerous times, and has been the subject of regular congressional oversight hearings. The Act has been parsed by this circuit no fewer than ten times in published opinions delineating EPA authority in the NAAQS setting process. Yet this court now threatens to strike down section 109 of the Act as an unconstitutional delegation of

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[8]Briefing should address the possibility that the previous particulate matter standard will spring back to life in response to our decision to vacate the new coarse particulate matter standard.

congressional authority unless EPA can articulate an intelligible principle cabining its discretion. In doing so, the court ignores the last half-century of Supreme Court nondelegation jurisprudence, apparently viewing these permissive precedents as mere exceptions to the rule laid down 64 years ago in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 (1935). Because section 109's delegation of authority is narrower and more principled than delegations the Supreme Court and this court have upheld since Schechter Poultry, and because the record in this case demonstrates that EPA's discretion was in fact cabined by section 109, I respectfully dissent.

Section 109 requires EPA to publish air quality standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (1994). Compare section 109 to the language of section 303 of the Communications Act of 1934, which gave the FCC authority to regulate broadcast licensing in the "public interest," and which the Supreme Court sustained in National Broadcasting Co. v. United States, 319 U.S. 190, 225-26, 87 L. Ed. 1344, 63 S. Ct. 997 (1943). The FCC's general authority to issue regulations "as public convenience, interest, or necessity requires" was sustained in United States v. Southwestern Cable Co., 392 U.S. 157, 178, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968). The Supreme Court has sustained equally broad delegations to other agencies, including the Price Administrator's authority to fix "fair and equitable" commodities prices, Yakus v. United States, 321 U.S. 414, 426-27, 88 L. Ed. 834, 64 S. Ct. 660 (1944), the Federal Power Commission's authority to determine "just and reasonable" rates, FPC v. Hope Natural Gas Co., 320 U.S. 591, 600, 88 L. Ed. 333, 64 S. Ct. 281 (1944), the War Department's authority to recover "excessive profits" earned on

military contracts, Lichter v. United States, 334 U.S. 742, 778-786, 92 L. Ed. 1694, 68 S. Ct. 1294 (1948), and the Attorney General's authority to regulate new drugs that pose an "imminent hazard to public safety," Touby v. United States, 500 U.S. 160, 165, 114 L. Ed. 2d 219, 111 S. Ct. 1752 (1991). See also Milk Indus. Foundation v. Glickman, 328 U.S. App. D.C. 121, 132 F.3d 1467, 1475 (D.C. Cir. 1998) (upholding delegation to Secretary of Agriculture to approve interstate compacts upon a finding of "compelling public interest").

Given this extensive Supreme Court precedent sustaining general congressional delegations, no wonder the First Circuit rejected a similar nondelegation challenge to the Clean Air Act's "requisite to protect the public health" language:

> The power granted to EPA is not "unconfined and vagrant". [Schechter Poultry, 295 U.S. at 551 (Cardozo, J., concurring).] The Agency has been given a well defined task by Congress--to reduce pollution to levels "requisite to protect the public health", in the case of primary standards. The Clean Air Act outlines the approach to be followed by the Agency and describes in detail many of its powers.... Yet there are many benchmarks to guide the Agency and the courts in determining whether or not EPA is exceeding its powers, not the least of which is that the rationality of the means can be tested against goals capable of fairly precise definition in the language of science.
>
> Administrative agencies are created by Congress because it is impossible for the Legislature to acquire sufficient information to manage each detail in the long process of extirpating the abuses identified by the legislation; the Agency must have flexibility to

> implement the congressional mandate. Therefore, although the delegation to EPA was a broad one, ... we have little difficulty concluding that the delegation was not excessive.

South Terminal Corp. v. EPA, 504 F.2d 646, 677 (1st Cir. 1974).

I do not agree with my colleagues that International Union, UAW v. OSHA, 291 U.S. App. D.C. 51, 938 F.2d 1310 (D.C. Cir. 1991) ("Lockout/Tagout I"), requires a different result. That case remanded to OSHA for a more precise definition of section 3(8) of the Occupational Safety and Health Act, which granted the Agency authority to enact workplace safety standards "reasonably necessary or appropriate to provide safe or healthful employment or places of employment." 938 F.2d at 1316. The Clean Air Act does not delegate to EPA authority to do whatever is "reasonably necessary or appropriate" to protect public health. Instead, the statute directs the Agency to fashion standards that are "requisite" to protect the public health. In other words, EPA must set pollution standards at levels necessary to protect the public health, whether "reasonable" or not, whether "appropriate" or not.

Moreover, in setting standards "requisite to protect the public health" EPA discretion is not unlimited. The Clean Air Act directs EPA to base standards on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2); see id. § 7409(b)(1); see also id. § 7408(a)(2) (requiring air quality criteria, "to the extent practicable," to "include information on--(A) those variable

factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant; (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and (C) any known or anticipated adverse effects on welfare"). Indeed, the principles constraining EPA discretion are at least as specific as those this court sustained in Lockout/Tagout II, i.e., that OSHA must identify a " 'significant' safety risk, to enact a safety standard that provides 'a high degree of worker protection'." International Union, UAW v. OSHA, 308 U.S. App. D.C. 368, 37 F.3d 665, 669 (D.C. Cir. 1994) ("Lockout/Tagout II"). By directing EPA to set NAAQS at levels "requisite"-not reasonably requisite--to protect the public health with "an adequate margin of safety," the Clean Air Act tells EPA exactly the same thing, i.e., ensure a high degree of protection.

Although this court's opinion might lead one to think that section 109's language permitted EPA to exercise unfettered discretion in choosing NAAQS, the record shows that EPA actually adhered to a disciplined decisionmaking process constrained by the statute's directive to set standards "requisite to protect the public health" based on criteria reflecting the "latest scientific knowledge." To identify which health effects were "significant enough" to warrant protection, EPA followed guidelines published by the American Thoracic Society. See National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,722/1 (1996). It then set the ozone and fine particle standards within ranges recommended by CASAC, the independent scientific advisory committee created pursuant to section 109 of the Act. See 42 U.S.C. § 7409(d)(2).

CASAC must consist of at least one member of the National Academy of Sciences, one physician, and one person representing state air pollution control agencies. See id. § 7409(d)(2)(A). In this case, CASAC also included medical doctors, epidemiologists, toxicologists and environmental scientists from leading research universities and institutions throughout the country. EPA must explain any departures from CASAC's recommendations. See id. § 7607(d)(3). Bringing scientific methods to their evaluation of the Agency's Criteria Document and Staff Paper, CASAC provides an objective justification for the pollution standards the Agency selects. Cf. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993) (" 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology today is what distinguishes science from other fields of human inquiry.' ") (citation omitted). Other federal agencies with rulemaking responsibilities in technical fields also rely heavily on the recommendations, policy advice, and critical review that scientific advisory committees provide. See, e.g., 21 U.S.C. § 355(n) (describing scientific advisory panels for the Food and Drug Administration); 49 U.S.C. § 44912(c) (creating a scientific advisory panel for the Federal Aviation Administration).

Beginning with CASAC's ozone recommendations--not one member recommended going below .08 ppm--EPA gave two perfectly rational explanations for the level it selected. First, it set the annual level based on the different types of health effects observed above and below .08 ppm. Particularly below .08, the Agency determined, "the most certain [ozone-]related effects, while judged to be adverse, are transient and reversible." National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,868/2 (1997) (emphasis added). Characterizing this explanation as saying nothing more than

that "lower exposure levels are associated with lower risk to public health," Maj. Op. at 10, my colleagues find the Agency's reasoning unintelligible. But EPA did not find simply that public health risks decrease at lower levels. Instead, it found that public health effects differ below .08 ppm, i.e., that they are "transient and reversible."

Second, EPA explained that the level should not be set below naturally occurring background ozone concentrations. The Agency selected .08 ppm because it found that "a 0.07 ppm level would be closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of [ozone] precursors, and thus more likely to be inappropriately targeted in some areas on such sources." 62 Fed. Reg. at 38,868/3. Of course, any level of ozone pollution above background concentrations is closer to background levels than one just above it. See Maj. Op. at 11. But as I read EPA's explanation, the Agency found that peak background levels sometimes occur at .07 ppm, not at .08 ppm. Indeed, the data EPA provided in its "Responses to Significant Comments" show a range of background concentrations from a low of .042 ppm in Olympic National Park in Washington to a high of .075 ppm in Quachita National Forest in Arizona. No region registered background levels above .075 ppm. See U.S. ENVIRONMENTAL PROTECTION AGENCY, RESPONSES TO SIGNIFICANT COMMENTS ON THE 1996 PROPOSED RULE ON THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE 94-96 (July 1997). In other words, by setting the annual standard at .08 rather than .07 ppm, EPA ensured that if a region surpasses the ozone standard, it will do so because of controllable human activity, not because of uncontrollable natural levels of ozone.

EPA offered an equally reasonable explanation for the fine particle pollution standard. Again limiting itself to the

range approved by CASAC, EPA set the annual standard for $PM_{2.5}$ pollution at the lowest level where it had confidence that the epidemiological evidence (filtered through peer-reviewed, published studies) displayed a statistically significant relationship between air pollution and adverse public health effects.

Recognizing that its decision must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health," 42 U.S.C. § 7408(a)(2), EPA focused on three studies in the record that displayed a statistically significant relationship between fine particle pollution and adverse health effects: Joel Schwartz et al., Is Daily Mortality Associated Specifically with Fine Particles?, 46 J. AIR & WASTE MGMT. ASS'N 927 (1996); Joel Schwartz et al., Acute Effects of Summer Air Pollution on Respiratory Symptom Reporting in Children, 150 AM. J. RESPIRATORY & CRITICAL CARE MED. 1234 (1994); and Douglas W. Dockery et al., An Association between Air Pollution and Mortality in Six U.S. Cities, 329 NEW ENG. J. MED. 1753 (1993). The Agency explained that "there is generally greatest statistical confidence in observed associations [between fine particle pollution and adverse health effects] for levels at and above the mean concentration [of pollution observed in the studies that showed a statistically significant relationship]." National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,676/1 n.42 (1997) (emphasis added). Allowing "an adequate margin of safety," EPA then set the annual fine particle standard just below the lowest mean pollution levels observed in those studies, at 15 Sg/m3. See id. at 38,676/1 ("An examination of the long-term means from the combined six city analyses of daily mortality [Schwartz et al. (1996)] and morbidity [Schwartz et al. (1994)], together with those from studies in individual cities for which statistically significant PM-effects associations are reported ...

finds mean concentrations ranging from about 16 to about 21 Sg/m3...."); id. at 38,676/2 ("[The EPA] Staff Paper assessment of the concentration-response results [from Dockery et al. (1993)], concluded that the evidence for increased risk was more apparent at annual concentrations at or above 15 Sg/m3....").

In a passage directly answering this court's concerns, see Maj. Op. at 11-12, the Staff Paper explained why the longterm mean served as a reasonable level for setting the fine particle NAAQS:

> The mean (or median) concentration may serve as a reasonable cutpoint of increased PM health risk since at this point there is generally the greatest confidence (i.e., the smallest confidence intervals) in the association and the reported [relative risk] estimates. The mean concentration considered by staff as most informative to test implications of potential alternative concentration response functions is the minimum mean concentration associated with a study or studies reporting statistically significant increases in risk across a number of study locations....

OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. ENVIRONMENTAL PROTECTION AGENCY, REVIEW OF NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION, at E-4 (1996) (emphasis added).

EPA thus did not, as my colleagues charge, arbitrarily pick points on the ozone and particulate pollution continua indistinguishable from any other. Instead, acting pursuant to

section 109's direction that it establish standards that, based on the "latest scientific knowledge" are "requisite" to protect the public health with "an adequate margin of safety," and operating within ranges approved by CASAC, the Agency set the ozone level just above peak background concentrations where the most certain health effects are not transient and reversible, and the fine particle level at the lowest long-term mean concentration observed in studies that showed a statistically significant relationship between fine particle pollution and adverse health effects. Whether EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies (as petitioners argue), or whether EPA failed to live up to the principles it established for itself (as my colleagues believe, see Maj. Op. at 9-12), has nothing to do with our inquiry under the nondelegation doctrine. Those issues relate to whether the NAAQS are arbitrary and capricious. See NRDC v. EPA, 284 U.S. App. D.C. 136, 902 F.2d 962, 969, 971 (D.C. Cir. 1989). The Constitution requires that Congress articulate intelligible principles; Congress has done so here.

A final point. Unlike OSHA, which Lockout/Tagout I recognized has authority to reach into every workplace to dictate what is safe, to impose extensive civil and criminal penalties, and "to decide which firms will live and which will die," Lockout/Tagout I, 938 F.2d at 1318, EPA regulates primarily by setting standards for states to develop their own plans. See 42 U.S.C. § 7401(a)(3) (Congress finds "that air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments."). Indeed, because states have three years to submit implementation plans, which are themselves subject to notice, comment, public hearing, and frequent renegotiation, we will not know for years precisely how the ozone and particle NAAQS will actually affect individual businesses. Only if a state fails to produce an acceptable plan can EPA terminate

federal highway funds or impose its own implementation plan. Because the Clean Air Act gives politically accountable state governments primary responsibility for determining how to distribute the burdens of pollution reduction and therefore how the NAAQS will affect specific industries and individual businesses, courts have less reason to second-guess the specificity of the congressional delegation. Moreover, if the states disagree with the standards EPA has set, they have 535 representatives in Congress to turn to for help. In fact, legislation to overturn the very NAAQS at issue in this case was introduced in the last Congress. See H.R. 1984, 105th Cong. (1997) ("A bill to provide for a four-year moratorium on the establishment of new standards for ozone and fine particulate matter under the Clean Air Act, pending further implementation of the Clean Air Act Amendments of 1990, additional review and air quality monitoring under that Act."); S. 1084, 105th Cong. (1997) ("A bill to establish a research and monitoring program for the national ambient air quality standards for ozone and particulate matter and to reinstate the original standards under the Clean Air Act, and for other purposes.").

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Intervenors

Consolidated with
Nos. 97-1546, 97-1548, 97-1551, 97-1552, 97-1553, 97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567, 97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579, 97-1583, 97-1583, 97-1586, 97-1587, 97-1588, 97-1592, 97-1594, 97-1596, 97-1597, 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Intervenors

Consolidated with

Nos. 97-1502, 97-1505, 97-1508, 97-1509, 97-1510, 97-1512, 97-1513, 97-1514, 97-1518, 97-1519, 97-1526, 97-1531, 97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575, 97-1584, 97-1589, 97-1591, 97-1595, 97-1619

United States Court of Appeals,
District of Columbia Circuit

Decided October 29, 1999.

Before WILLIAMS, GINSBURG, and TATEL, *Circuit Judges*. TATEL, *Circuit Judge*, concurring in part and dissenting in part.

This matter is before the court for consideration of respondent Environmental Protection Agency's (EPA) petition for panel rehearing in Nos 97-1440 and 97-1441, the responses thereto, and the petitions for panel rehearing of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizen for Balanced Transportation, et al. in No. 97-1440, and the American Lung Association in Nos. 97-1440 and 97-1441. Upon consideration of the foregoing, it is

ORDERED that the petitions of EPA, New Jersey and Massachusetts, and the American Lung Association be granted in part. The court accordingly modifies Parts III.A.2 & .3 and the conclusion of the court's original opinion as set forth in the opinion of the court filed herein this date. It is

FURTHER ORDERED that the remainder of EPA, New Jersey and Massachusetts, and the American Lung Association's petitions be denied and that Citizen for Balanced Transportation's petition be denied.

Opinion for the Court filed PER CURIAM:

The Environmental Protection Agency petitions for rehearing, challenging this court's holdings that: (1) with respect to the factors the agency uses to determine the degree of public health concern associated with different levels of a pollutant, it "appears to have articulated no 'intelligible principle' to channel its application of these factors; nor is one apparent from the statute," American Trucking Ass'ns v. United States Environmental Protection Agency, 175 F.3d 1027, 1034 (D.C. Cir. 1999); (2) "Subpart 2, not Subpart 1, provides the classifications and attainment dates for any areas designated nonattainment under a revised primary ozone NAAQS, and the EPA must enforce any revised primary ozone NAAQS under Subpart 2," id. at 1050; and (3) "EPA must consider positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under § 108 and NAAQS under § 109," id. at 1052. For the following reasons, we grant the petition for rehearing in part and deny it in part.

I. Delegation

In the EPA's petition for rehearing, counsel for the agency argue that § 109 of the Clean Air Act contains the following principle limiting the agency's discretion: "The levels [set in a NAAQS] must be necessary for public health protection: neither more nor less stringent than necessary, but 'requisite.' "EPA Pet. at 8 (emphases in original). Further, counsel claim that in setting the NAAQS at issue in this case the agency applied corollaries of this principle, one for

particulate matter, one for ozone,[1] to derive determinate standards.

In denying the EPA's petition for rehearing on this issue, we note that the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom. To be sure, in the rulemakings that set the NAAQS, the EPA mentioned the corollary propositions its counsel now claim served as intelligible limiting principles, but the agency did not identify either as a limit upon its discretion; the EPA never suggested that it could not (or in a later rulemaking would not) base a NAAQS upon evidence that did not meet the 95 percent confidence level or that revealed adverse but transient effects.[2] In its briefs defending the NAAQS, the EPA merely asserted that the Clean Air Act provides an intelligible principle; it failed both to state that principle and to argue that its revised NAAQS were promulgated in accordance with that principle. EPA PM Brief at 145-49; EPA Ozone Brief at 77-80. Indeed, the EPA's briefs in each of these two cases contained

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[1]For particulate matter, counsel now state that the EPA's decision was determined by the norm of "the 95 percent confidence level to separate results that could be the product of chance from more convincing evidence of causation." EPA Pet. at 15. For ozone, counsel now state that EPA inferred the existence of effects below 0.08 ppm, but nonetheless concluded that they were "less serious because they are 'transient and reversible.' " EPA Pet. at 16.

[2]The court's opinion mentioned EPA's observation in the record that effects of ozone concentrations below the standard selected were "transient and reversible," 175 F.3d at 1035, but only in connection with the dissent's suggestion, see id. at 1059, that this was the controlling principle.

the same four sentences assuring the court that the statute provides a principle without explaining what the agency understands that principle to be:

> [Section] 109(b)(1) requires EPA to promulgate NAAQS based on air quality criteria issued under § 108 that are "requisite to protect the public health" with "an adequate margin of safety." This language and related legislative history provide directions for EPA to follow in setting the NAAQS. Moreover, EPA has consistently interpreted § 109(b)(1) to provide further decisionmaking criteria to guide the standard setting process. Thus, the CAA provides a more than sufficient "intelligible principle" to guide EPA's discretion. EPA Ozone Brief at 78; see also EPA PM Brief at 148.

These sentences begged the key question about that intelligible principle: "What is it?"

As we noted in our first opinion in this case, when "statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038. Counsel for the EPA have now extracted from the statute what they contend is an intelligible principle limiting the EPA's discretion. We express no opinion upon the sufficiency of that principle; only after the EPA itself has applied it in setting a NAAQS can we say whether the principle, in practice, fulfills the purposes of the nondelegation doctrine. See Yakus v. United States, 321 U.S. 414, 424-26, 88 L. Ed. 834, 64 S. Ct. 660 (1944); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) (Leventhal, J., for three-judge panel).

A final word about our nondelegation holding: The Supreme Court has long held that an ambiguous principle in a statute delegating power to an agency can gain "meaningful content from the purpose of the Act, its factual background and the statutory context in which [it] appears." American Power & Light Co. v. SEC, 329 U.S. 90, 104, 91 L. Ed. 103, 67 S. Ct. 133 (1946); see also Federal Radio Comm'n v. Nelson Bros. Bond & Mort. Co., 289 U.S. 266, 285, 77 L. Ed. 1166, 53 S. Ct. 627 (1933) (upholding delegation to Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires" in light of "its context [and] the nature of radio transmission and reception"); Fahey v. Mallonee, 332 U.S. 245, 250, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947) (upholding delegation to the Federal Home Loan Bank Board to promulgate regulations for the appointment of a conservator for savings and loan associations in view of the banking industry's "well-defined practices for the appointment of conservators"). This court has done the same. See, e.g., National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 218 U.S. App. D.C. 348, 675 F.2d 367, 376 n.12 (1982) (finding an intelligible principle to guide the tribunal in disbursing cable royalty fees in "specific statements in the legislative history and in the general philosophy of the Act itself"); Amalgamated Meat Cutters, 337 F. Supp. at 747-49 (interpreting the Economic Stabilization Act of 1970 in light of "the historic context of government stabilization measures" in order to "negative[ ] a conclusion that the whole program was set adrift without a rudder"). To choose among permissible interpretations of an ambiguous principle, of course, is to make a policy decision, and since Chevron it has been clear that "the responsibilities for assessing the wisdom of such policy choices ... are not judicial ones." Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 866, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Accordingly, just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to

an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority. But see Kenneth Culp Davis, A New Approach to Delegation, 36 U. CHI. L. REV. 713, 713 (1969) (arguing that "judicial inquiries [under the nondelegation doctrine] should shift from statutory standards to administrative safeguards"). In sum, the approach of the Benzene case, in which the Supreme Court itself identified an intelligible principle in an ambiguous statute, has given way to the approach of Chevron. See Industrial Union Dep't v. American Petroleum Inst. (Benzene), 448 U.S. 607, 642, 646, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980) (Stevens, J., plurality) (interpreting § 3(8) of the Occupational Health and Safety Act to require "a threshold finding ... that significant risks are present," thereby finding in the statute an intelligible principle).[3]

II. Subpart 2 and the Revised Ozone Standard

In its petition for rehearing, the EPA challenges the holdings in Parts III.A.2 and III.A.3 of our original opinion, see 175 F.3d at 1048-51, as well as our jurisdiction to reach those issues. We address the jurisdictional point first.

A. Jurisdiction

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[3]We note that Judge Silberman's dissent from the denial of rehearing en banc turns largely on his dim view of the Court's use of the non-delegation doctrine in Benzene, which he characterizes as "only a makeweight, tossed into the analysis ... to help justify the result." Whatever the merits of Judge Silberman's critique of Benzene, we do not see how a lower court can properly rest its jurisprudence on the rejection of a Supreme Court decision.

The EPA argues that because it has taken no final action implementing the revised NAAQS this court lacks jurisdiction to reach the question whether Subpart 2 prevents the agency from implementing a revised ozone NAAQS under Subpart 1. See 42 U.S.C. § 7607(b) (limiting this court's jurisdiction to review of "nationally applicable regulations promulgated, or final agency action taken, by the Administrator"); see also Sierra Club v. Thomas, 264 U.S. App. D.C. 203, 828 F.2d 783, 792 (D.C. Cir. 1987).[4] That this claim is raised for the first time in a petition for rehearing does not, of course, alter our obligation to "satisfy ourself ... of [our] own jurisdiction." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003, 1012-13, 140 L. Ed. 2d 210 (1998).

Whether agency action is final for purposes of § 7607(b) entails a functional, not a formal, inquiry. See NRDC v. EPA, 306 U.S. App. D.C. 43, 22 F.3d 1125, 1132-33 (D.C. Cir. 1994); Ciba-Geigy Corp. v. EPA, 255 U.S. App. D.C. 216, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review"). In this case, "there is nothing tentative about the EPA's interpretation of [Subpart 2]; it is unambiguous and devoid of any suggestion that it might be subject to subsequent revision." Her Majesty the Queen ex rel. Ontario v. EPA, 286 U.S. App. D.C. 171, 912 F.2d 1525, 1532 (D.C. Cir. 1990); see also Final Rule: National Ambient Air

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[4]The EPA has yet to designate an area nonattainment. Therefore, although the agency does not so argue, if it were correct, then this court would also lack jurisdiction to decide, as it did, that Subpart 2 does not alter the agency's power to designate areas as nonattainment under a revised NAAQS. See 175 F.3d at 1047-48.

Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,885/2 (1997) ("There is no language in sections 181 or 182 that precludes the implementation of a different [ozone] standard under other authority [i.e., Subpart 1]; those provisions [i.e., Subpart 2] simply govern the implementation of the 1-hour, 0.12 ppm O_3 standard"). Moreover, by promulgating a revised ozone NAAQS the EPA has triggered the provisions of §§ 107(d)(1) and 172, which impose a number of requirements upon the states, the first being that the Governor of each state must determine which areas do not presently comply with the revised NAAQS; those areas that do not comply will ultimately be required to do so. The EPA, therefore, has reached a final decision regarding its power to implement its revised ozone standard, which this court has jurisdiction to review.[5]

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[5]The EPA attempts to buttress its jurisdictional argument by reference to 42 U.S.C. § 7502(a)(1)(B), which it claims "defers challenges to EPA's implementation decisions classifying areas for setting attainment dates until EPA takes final action on a SIP ... or triggers sanctions ... [after] a state fails to submit a SIP." EPA Pet. at 19. The section to which the EPA refers states as follows: "The Administrator shall publish a notice in the Federal Register announcing each [attainment or nonattainment] classification.... Such classification ... shall not be subject to judicial review until the Administrator takes final action under [the statutes the EPA cites in its petition]." That is, the EPA's decision to classify a particular area as attainment or nonattainment is not subject to review merely because the EPA published that decision in the Federal Register. Neither this section nor the analogous § 7511(a)(3), to which the EPA also cites, prevents a court from deciding, prior to the classification of a particular area, whether the agency has validly promulgated a revised standard.

The EPA also argues that the statements in its preamble regarding implementation are not "ripe for review," a point which it raised in a single sentence in its original brief to this court. EPA Pet. at 19; EPA Ozone Brief at 74. The question whether Subpart 2 prevents the EPA from designating an area as nonattainment under its revised ozone standard or from implementing that designation except in conformity with Subpart 2 is a pure question of law, the resolution of which would not benefit from a more concrete setting. As the agency's action is undoubtedly final, the question is fit for review. See Rio Grande Pipeline Co. v. FERC, 178 F.3d 533, 540-41 (D.C. Cir. 1999).

B. Subpart 2 and the EPA's Authority to Enforce a Revised Ozone Standard

The EPA's arguments in its petition for rehearing do not convince us that we erred in rejecting the EPA's contention that "the reference to § 107(d) in § 181(a)(1) relates only to designations made under § 107(d)(4)," 175 F.3d at 1050, and in holding instead that " § 181(a) clearly encompasses nonattainment designations made under all subsections of § 107(d)." Id. Indeed, we note that the EPA has abandoned its original position, arguing now that the "most logical reading" of § 181(a) is that the reference to § 107(d) includes §§ 107(d)(1)(C) and 107(d)(4). EPA Pet. at 24. We find this new reading no more persuasive than the old. As the EPA notes, all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d). See 42 U.S.C. §§ 7502(a)(1)(A), 7511(a)(1), 7512(a)(1), 7513(a), 7514(a). It is by no means clear, however, that the references to § 107(d) in Subparts 1 and 3 through 5 include only designations made under §§ 107(d)(1)(C) and (d)(4). Not only does the EPA never argue that they are so limited, but on its theory the reference to § 107(d) in Subpart 1 also encompasses

designations made under § 107(d)(1)(A). EPA Pet. at 25. Accordingly, we reject the EPA's new interpretation of § 181(a), for it is contrary to "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995).

Still, the EPA does raise two points relating to Subpart 2 which lead us to grant the EPA's petition for rehearing in part and to make the following revisions to our opinion.

The EPA correctly points out that we erroneously treated the attainment dates in the table in Subpart 2 as representing the Congress's judgment about what is "as expeditiously as practicable" in reducing the level of ozone in an area; in fact, those dates represent what the Congress set as outer limits. See 42 U.S.C. § 7511(a)(1) ("For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1"). EPA Pet. at 25 n.35. Accordingly, we grant the EPA's petition for rehearing to the extent of deleting the final three sentences of Part III.A.3, see 175 F.3d at 1051, and substituting for them the following sentence:

> Therefore, we conclude that Subpart 2 erects no bar to the EPA's requiring compliance with a revised secondary ozone NAAQS "as expeditiously as practicable."

The EPA also contends that the conclusion to Part III.A.2, see id. at 1050 ("the EPA must enforce any revised primary ozone NAAQS under Subpart 2"), conflicts with our description of that same conclusion at the end of the opinion,

see id. at 1057 (revised ozone NAAQS "cannot be enforced by virtue of [Subpart 2]"). We agree that the two sentences are in tension. To clarify the matter, we grant the EPA's petition for rehearing to the extent of making the following two revisions to our original opinion. First, we replace the final paragraph of Part III.A.2, see id. at 1050, with the following:

> In sum, because the reference to § 107(d) in § 181(a)(1) includes the designation of an area as nonattainment for ozone under a revised ozone NAAQS, that is, under § 107(d)(1), the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2.

Second, we replace the second sentence of the Conclusion, see id. at 1057, with the following:

> We do not vacate the new ozone standards because the parties have not shown that the standard is likely to engender costly compliance activities in light of our determination that it can be enforced only in conformity with Subpart 2.

As with the $PM_{2.5}$ NAAQS, our decision not to vacate the ozone NAAQS "is without prejudice to the ability of any party to apply for vacatur in the future, should circumstances develop in which the presence of this standard threatens a more imminent harm." American Trucking Ass'ns, Inc. v. EPA, No. 97-1440 (D.C. Cir. Jun. 18, 1999).

III. Beneficent Health Effects

The arguments in the EPA's petition for rehearing give us no reason to doubt the correctness of our conclusion that "all identifiable effects," as used in CAA § 108(a)(2), "on its face ... includes beneficent effects." 175 F.3d at 1051. Nor do those

arguments warrant consideration in a published opinion. We express no opinion, of course, upon the effect, if any, that studies showing the beneficial effects of tropospheric ozone, see id. at 1052, might have upon any ozone standard the EPA may promulgate on remand.

IV. Conclusion

For the above reasons, the EPA's petition for rehearing is

Granted in part and denied in part.

TATEL, Circuit Judge, concurring in part and dissenting in part:

I concur in the partial grant of rehearing with respect to enforcement of the revised ozone standard because, as modified, the opinion now leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with Subpart 2's classifications and attainment dates. While I too think that we have jurisdiction to decide the enforcement issue, I write separately because I do not entirely agree with the rationale of the modified panel opinion.

The panel understood EPA's original position to be that, although Subpart 2 limited the Agency's enforcement of the pre-existing one-hour 0.12 ppm ozone NAAQS, it "has no effect upon the EPA's authority to enforce a revised primary ozone NAAQS." American Trucking Ass'ns v. EPA, 175 F.3d 1027, 1048 ("ATA"). That interpretation, the panel held, not only conflicted with section 7511(a)(1)'s text and legislative history, see id., 175 F.3d at 1048-49, but by leaving the Agency free to "require areas to comply either more quickly or with a more stringent ozone NAAQS," it defied Congress's clear intent

to "extend[ ] the time for nonattainment areas to comply with the 0.12 ppm ozone NAAQS." Id. at 1049.

Having rejected the Agency's interpretation, the panel went on to agree with petitioners that Subpart 2 embodies "a comprehensive enforcement scheme" that "specifically provides classifications and dates for all areas designated nonattainment under any ozone NAAQS." Id. at 1049, 1048 (emphasis added). This holding meant that areas not covered by Table 1 in Subpart 2--i.e. those with one-hour ozone design values below 0.121 ppm--were completely exempt from any ozone regulation whatsoever. Although the panel acknowledged that EPA must continue to revise the NAAQS, see id. at 1047, it concluded that the revised standard "cannot be enforced by virtue of [Subpart 2]." Id. at 1057.

After reading EPA's petition for rehearing and the various responses, I no longer believe that it was "the unambiguously expressed intent of Congress" to command EPA to revise the ozone standards, while denying it the power to enforce them. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842, 81 L. Ed. 2d 694, 104 S. Ct. 2778. Table 1 specifically provides classifications and attainment dates for some areas, but as EPA points out, "it establishes no attainment dates or classifications for nonattainment areas with 'design values' lower than 0.121 ppm." EPA Pet. Reh'g at 22-23. As the Agency argues, it is thus difficult to see how Subpart 2 can "specifically provide[ ]" attainment dates for areas that are designated nonattainment under the new standard but are not covered by Table 1. See id. at 22-24. This gap in Table 1 makes it at least ambiguous whether Subpart 2 "specifically provides" classifications and attainment dates for all areas exceeding the revised 0.08 ppm ozone NAAQS.

EPA also points out that treating Subpart 2 as the exclusive enforcement scheme for all areas leads to "irrational and contradictory consequences." Id. at 23. Subpart 2 provides that "each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified ... under table 1, by operation of law...." 42 U.S.C. § 7511(a)(1). Even if the panel is correct that the reference to section 7407(d) includes designations under a revised NAAQS pursuant to section 7407(d)(1)(A), see Slip Op. on Reh'g at 6-7, the fact remains that the only "nonattainment areas for which classifications [and attainment dates] are specifically provided under" Table 1 are those having one-hour ozone design values of 0.121 ppm or greater. ATA, 175 F.3d at 1048 (quoting 42 U.S.C. § 7502(a)(1)(C), (a)(2)(D)). Classifying other areas "under table 1, by operation of law" is thus impossible or, at the very least, not "unambiguously" "specifically provided for." And although, as the panel noted, "a title [of a statute or section] cannot be allowed to create an ambiguity in the first place," id., at 1050, the ambiguity in this statute--Can section 7511(a)(1) be applied literally to areas that have attained the old standard but fail to meet the new one?-- appears in the text of Subpart 2 itself.

Moreover, EPA has offered a plausible interpretation of the statute that reasonably reconciles the provisions of Subparts 1 and 2. In its Petition for Rehearing, the Agency states that "Subpart 2 addresses continued nonattainment for the primary one-hour ozone standard," EPA Pet. Reh'g at 20, while Subpart 1 provides implementation authority for the new ozone standard in areas that have already attained the old one, see id. at 20-22. The Agency articulated this same reading of the statute in its original brief, stating that "consistent with Congress' intent, EPA interpreted the Subpart 2 provisions to remain in place for areas not attaining the one-hour standard, and concluded the one-hour standard should continue to apply until EPA determines that an area attains that standard, thus facilitating

continued implementation of the relevant Subpart 2 measures." EPA Ozone Brief at 72. The final rulemaking--the Agency action we are reviewing here--is even clearer about the relationship between Subparts 1 and 2:

> At the time of the proposal of the new O_3 standard, EPA had proposed an interpretation of the Act in the proposed Interim Implementation Policy (61 FR 65764, December 13, 1996) under which the provisions of sub-part 2 of part D of Title I of the Act would not apply to existing O_3 nonattainment areas once a new O_3 standard becomes effective.
>
> In light of comments received regarding the interpretation proposed in the Interim Implementation Policy, EPA has reconsidered that interpretation and now believes that the Act should be interpreted such that the provisions of subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard. As a consequence, the provisions of subpart 2, which govern implementation of the 1-hour O_3 standard in O_3 nonattainment areas, will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. Once an area attains that standard, however, the purpose of the provisions of subpart 2 will have been achieved and those provisions will no longer apply. However, the provisions of subpart 1 of part D of Title I of the Act would apply to the implementation of the new 8-hour O_3 standards.
>
> To facilitate the implementation of those provisions and to ensure a smooth transition to the implementation of the new 8-hour standard, the 1-hour standard should remain applicable to areas that are not

> attaining the 1-hour standard. Therefore, the 1-hour standard will remain applicable to an area until EPA determines that it has attained the 1-hour standard, at which point the 1-hour standard will no longer apply to that area.

62 Fed. Reg. 38,873 (1997), cited in EPA Ozone Brief at 72. See also 40 C.F.R. § 50.9(b) (continuing to apply the one-hour 0.12 ppm standard until it is attained).

To be sure, EPA's original brief did seem to advance the position the panel rejected--that in enforcing the new ozone NAAQS, the Agency is free to disregard altogether Subpart 2's timetable. See EPA Ozone Brief at 69-71. Given the clarity of the final rule, however, I no longer believe that EPA actually intended to argue that it could subvert Subpart 2's schedule in enforcing the new ozone NAAQS. When EPA's lawyers said in the original brief that Subpart 2 is inapplicable to nonattainment areas under the new ozone standard, I assume they must have meant that even under the new standard, Subpart 2 continues to apply to areas covered by Table 1--not that Subpart 2 no longer applies at all. Viewed this way, EPA's original brief and its petition for rehearing are perfectly consistent with the final rule: all three interpret the Act to mean that Subpart 2 still applies to an area until it attains the one-hour 0.12 ppm standard. This interpretation puts to rest the panel's concern that Subpart 2's attainment schedule "would have been stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments." ATA, 175 F.3d at 1050.

The Agency's petition also explains the practical consequences of its interpretation of Subpart 2. Although EPA may not enforce a stricter ozone standard in Los Angeles earlier than the year 2012, see id., at 1049, the Agency need not wait for Los Angeles to achieve the old standard before requiring the

rest of the country to move toward cleaner air. Cf. EPA Pet. Reh'g at 25 (suggesting that Los Angeles "is the only area of the nation" where compliance with the 0.08 ppm NAAQS under Subpart 1 could possibly be required at the same time as compliance with the 0.12 ppm NAAQS under Subpart 2). In other words, Table 1 functions as a safe harbor for areas like Los Angeles whose ozone levels exceed 0.121 ppm.

To sum up, the panel rejected what it was led to believe was EPA's view that Subpart 2 applied only to nonattainment areas under the old standard but no longer applies at all under the new standard. The panel held instead that Subpart 2 applies to all nonattainment areas under any standard, foreclosing implementation of a new standard in any area not covered by Table 1. EPA has now clarified its interpretation of the Act. A middle ground originally articulated in its final rulemaking, the Agency's position harmonizes its general enforcement authority under Subpart 1 with the specific provisions of Subpart 2. Subpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under Subpart 1.

I would have granted rehearing and held that the Agency's position represents a reasonable interpretation of an ambiguous statute. See Chevron, 467 U.S. at 844 (upholding EPA's construction of NAAQS attainment provisions of the Clean Air Act, stating that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). I nonetheless concur in the judgment because the revised opinion's statement that "the EPA can enforce a revised primary ozone NAAQS only in conformity with Subpart 2" leaves open the possibility that the new ozone standard can be implemented in areas that have attained the old standard.

For the reasons set forth in my statement dissenting from the denial of rehearing en banc, I respectfully dissent from the denial of rehearing as to Part I of the panel opinion ("Delegation").

No. 97-1440

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Intervenors

Consolidated with
Nos. 97-1546, 97-1548, 97-1551, 97-1552, 97-1553, 97-1555, 97-1559, 97-1561, 97-1562, 97-1565, 97-1567, 97-1571, 97-1573, 97-1574, 97-1576, 97-1578, 97-1579, 97-1583, 97-1583, 97-1586, 97-1587, 97-1588, 97-1592, 97-1594, 97-1596, 97-1597, 97-1598

No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Intervenors

Consolidated with

Nos. 97-1502, 97-1505, 97-1508, 97-1509, 97-1510, 97-1512, 97-1513, 97-1514, 97-1518, 97-1519, 97-1526, 97-1531, 97-1539, 97-1566, 97-1568, 97-1570, 97-1572, 97-1575, 97-1584, 97-1589, 97-1591, 97-1595, 97-1619

United States Court of Appeals,
District of Columbia Circuit

Decided October 29, 1999.

Before: EDWARDS, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges. Circuit Judges WALD and HENDERSON did not participate in this matter. Chief Judge EDWARDS and Circuit Judges SILBERMAN, Rogers, Tatel, AND Garland WOULD GRANT THE SUGGESTION. SILBERMAN, Circuit Judge, dissenting from the denial of rehearing en banc. TATEL, Circuit Judge, with whom EDWARDS, Chief Judge, and GARLAND, Circuit Judge, join, dissenting from the denial of rehearing en banc.

Respondent EPA's Suggestion for Rehearing En Banc and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

Circuit Judges WALD and HENDERSON did not participate in this matter.

Chief Judge EDWARDS and Circuit Judges SILBERMAN, Rogers, Tatel, AND Garland WOULD GRANT THE SUGGESTION.

SILBERMAN, Circuit Judge, dissenting from the denial of rehearing en banc:

The panel's reliance on the nondelegation doctrine to reject EPA's interpretation of section 109 of the Clean Air Act is rather ingenious, but I regret that it seems to me to be fundamentally unsound. I do not think that doctrine can be employed to force an agency to narrow a broad legislative delegation from Congress.

The doctrine, as Judge Tatel in dissent pointed out, American Trucking Ass'n v. EPA, 175 F.3d 1027, 1057-58 (D.C. Cir. 1999) ("ATA") (Tatel, J., dissenting in part), is at this stage of constitutional "evolution" not in particularly robust health. Justice Rehnquist heroically attempted to inject vitality into the doctrine in his powerful concurrence in the Benzene case, see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671, 65 L. Ed. 2d 1010, 100 S. Ct. 2844 (1980). But, sad to say, his view is not shared by a majority of the Court which has acknowledged only a theoretical limitation on the scope of congressional delegations to the executive branch. See Mistretta v. United States, 488 U.S. 361, 416, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

To be sure, the plurality in the Benzene case ostensibly relied on the doctrine to support its interpretation of the Occupational Safety and Health Act. See Benzene, 448 U.S.

607 at 645-46, 100 S. Ct. 2844, 65 L. Ed. 2d 1010. But a careful reading of the plurality opinion (not, of course, an opinion of the Court, which would bind us) reveals that the doctrine was only a makeweight, tossed into the analysis, in light of Justice Rehnquist's concurrence, to help justify the result. The plurality, disturbed at the seemingly draconian impact of the Secretary of Labor's standard as applied to several industries, analytically conflated the scope of the Secretary's discretion--the legitimate concern of the nondelegation doctrine--with the regulatory consequences of his interpretation of the statute. Id. at 645. The latter concern is not really germane to the doctrine; indeed, the Secretary was actually claiming he had less discretion than the plurality thought he had. Accordingly, the Benzene plurality opinion gives only lip service to the nondelegation doctrine; the boundaries limiting the scope of congressional delegation to the executive branch remain only dimly perceivable. I agree with Judge Tatel that the terminology of this section of the Clean Air Act does not come so close to those boundaries to raise a serious constitutional problem.

If it did, and we were faced with two conflicting interpretations of the statute--both plausible--I have no doubt that a constitutionally dubious agency interpretation could be rejected even in a post-Chevron era. The majority questions that proposition-and confuses the issue--by stating that "the approach of the Benzene case ... has given way to the approach of Chevron." Slip Op. on Reh'g at 4. The Supreme Court's opinion in Rust v. Sullivan, 500 U.S. 173, 191, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991), is to the contrary. See also infra at 1 (Tatel, J., dissenting from denial of rehearing en banc) (citing Mistretta, 488 U.S. at 373 n.7). In other words, the constitutional avoidance canon trumps Chevron deference. But that principle is not relevant to this case. Even assuming the statute was problematic, the panel was not faced with two competing constructions, one of which might be thought to

avoid constitutional difficulty. Indeed, the panel concluded that there are no intelligible principles "apparent from the statute" that brought EPA's discretion within constitutionally acceptable limits. ATA, 175 F.3d at 1034. If the panel believed that was so, it should have held the statute unconstitutional. Instead the panel, purporting to rely on Chevron, remanded to EPA directing that agency to come up with an artificially narrow interpretation with various suggestions offered by the panel to accomplish that end.[1] Id. at 1038-40. By so doing, I believe the panel undermines the purpose of the nondelegation doctrine.

That purpose is, of course, to ensure that Congress makes the crucial policy choices that are carried into law. The ability to make those policy choices (even if only at a broad level of generality) is what is meant by legislative power. See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). It hardly serves--indeed, it contravenes--that purpose to demand that EPA in effect draft a different, narrower version of the Clean Air Act.[2] Under that view Congress would be able to delegate

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[1]Like the plurality opinion in Benzene, these suggestions seem more directed to encouraging wiser policy choices than interpreting the statute at issue.

[2]The panel acknowledges this purpose but, relying on an old district court opinion as primary support, claims that its approach preserves two other rationales of the doctrine, limiting the ability of agencies to exercise delegated authority arbitrarily and providing meaningful standards for judicial review. See ATA, 175 F.3d at 1038 (citing Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (D.D.C. 1971). But these "purposes" are obviously derivative of the doctrine's primary function of ensuring that Congress makes key policy decisions. It is, after all, only this so-called "third" purpose, see id., that

almost limitless policymaking authority to an agency, so long as the agency provides and consistently applies an "intelligible principle."[3]

That is not to say that EPA is totally free to exercise its authority at any point on the discretionary continuum that Congress delegated to it in the Clean Air Act. The Administrative Procedure Act's arbitrary and capricious standard also limits the agency's actions. As we have observed, the broader the substantive statutory delegation the more likely that the agency's policy choices will be confined by the APA, rather than the substantive statute. See National Ass'n of Regulatory Comm'rs v. ICC, 309 U.S. App. D.C. 325, 41 F.3d 721, 727 (D.C. Cir. 1994) ("Whether an agency action is to be judged as reasonable, in accordance with the APA's general arbitrary and capricious standard, or whether it is to be examined as a permissible interpretation of the statute vel non depends, at least theoretically, on the scope of the specific congressional delegation implicated."). In that regard, I am quite uncertain whether EPA's regulatory choice meets that test. Judge Tatel's emphasis on the agency's extensive procedures does not appear to me to answer the question. It would not matter whether the agency "actually adhered to a disciplined decisionmaking process," ATA, 175 F.3d at 1059, if its final product was unreasonable. If we were to rehear the case, I would focus on that issue.

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has any connection to the doctrine's constitutional source.

[3]It is true that we used a similar approach in Industrial Union, UAW v. OSHA ("Lockout-Tagout I"), 291 U.S. App. D.C. 51, 938 F.2d 1310 (D.C. Cir. 1991). Although one could distinguish that case, I think it rests on a similarly flawed analysis of the doctrine.

Doctrine aside, then, what is the practical difference between my approach and the panel's? The answer, I think, is that the panel engages--and by retaining jurisdiction promises to continue to engage, see id., 175 F.3d at 1057--in a more searching review than the arbitrary and capricious standard would permit. By treating this case as a statutory interpretation question laden with constitutional implications the panel implicitly asserts a greater role for a reviewing court than is justified.

****

I respectfully dissent from our denial of rehearing en banc.

TATEL, Circuit Judge, with whom EDWARDS, Chief Judge, and GARLAND, Circuit Judge, join, dissenting from the denial of rehearing en banc:

In explaining why they remain convinced that the Clean Air Act contains an unconstitutional delegation of legislative power, my colleagues merely repeat that EPA has failed to articulate a sufficiently limiting principle. See Slip Op. on Reh'g at 1-3. They then launch into a discussion of the proper remedy once a court encounters a problematic legislative delegation and conclude that "the approach of the Benzene case ... has given way to the approach of Chevron." Slip Op. on Reh'g at 4. But see supra at 2-3 (Silberman, J., dissenting from the denial of rehearing en banc); Mistretta v. United States, 488 U.S. 361, 373 n.7, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional. See, e.g., [the Benzene case.]").

The issues discussed by my colleagues have no relevance to the constitutional question we face. As I pointed out in my dissent, the Clean Air Act's requirement that EPA set air quality standards "requisite to protect the public health" with "an adequate margin of safety" based on criteria that "accurately reflect the latest scientific knowledge" is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years. 42 U.S.C. § 7409(b)(1), § 7408(a)(2). See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 225-26, 87 L. Ed. 1344, 63 S. Ct. 997 (1943) (upholding delegation to the FCC to regulate broadcast licensing in the "public interest"); American Trucking Ass'n, Inc. v. EPA, 175 F.3d 1027, 1057-58 (D.C. Cir. 1999) (Tatel, J., dissenting in part) (collecting cases). In language particularly relevant to the highly technical and scientific process of setting national ambient air quality standards, the Supreme Court in Mistretta said this about the nondelegation doctrine: "Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. at 372. Such extensive and unambiguous Supreme Court precedent is more than enough to sustain the Clean Air Act's delegation of authority to the EPA. For purposes of constitutional analysis, we thus have no need to require that EPA state "a far more determinate basis for decision" beyond the intelligible principle Congress provided in the Clean Air Act. ATA, 175 F.3d at 1037. Nor have we any reason to consider what remedies might be available were we faced with a statute that failed to meet constitutional standards. Unless petitioners can persuade the Supreme Court to return to the days of Schechter Poultry, this "inferior" court has no authority to demand anything more from either EPA or Congress.

Neither American Lung Ass'n v. EPA, 328 U.S. App. D.C. 232, 134 F.3d 388 (D.C. Cir. 1998), nor the Benzene case, both heavily relied upon by petitioners in their opposition to the suggestion for rehearing en banc, supports the panel's opinion. No one in American Lung doubted the constitutionality of section 109's directive that EPA establish NAAQS "requisite to protect the public health." Applying the familiar arbitrary and capricious standard, we held only that the Agency, in setting the sulfur dioxide NAAQS, had failed adequately to explain its application of section 109. See American Lung, 134 F.3d at 392. The Benzene plurality stated nothing more than that section 3(8) of the OSHA statute implicitly requires the Agency to make a threshold finding that a substance to be regulated causes "significant risks of harm." 448 U.S. at 641. In support of this inference, the plurality pointed to the statute's structure, context, and legislative history, see id. at 642-45, adding that a broader reading "might" amount to an unconstitutional delegation, id. at 646. The conclusion that Congress may constitutionally delegate authority to OSHA to regulate "significant" risks of harm hardly supports the panel's holding that Congress may not constitutionally delegate authority to EPA to issue NAAQS "requisite" to protect the public health--a standard more restrictive than the one the Supreme Court derived and approved in the Benzene case.

The panel's nondelegation holding plainly "involves a question of exceptional importance" warranting en banc review. Fed. R. App. P. 35(a). Not only did the panel depart from a half century of Supreme Court separation-of-powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by hundreds of millions of people. See H.R. REP. NO. 101-490, pt. 1, at 144-45 (1990).

No. 97-1440

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No. 97-1441

AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
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United States Court of Appeals,
District of Columbia Circuit

Decided October 29, 1999.

Before: EDWARDS, Chief Judge; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges. Circuit Judges WALD and HENDERSON did not participate in this matter.

Upon consideration of the petitions for rehearing en banc of intervenors-respondents New Jersey and Massachusetts in Nos. 97-1440 and 97-1441, Citizens for Balanced Transportation, et al. in No. 97-1440 and the American Lung Association in Nos. 97-1440 and 97-1441, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

STATUTORY PROVISIONS

42 U.S.C. § 7407. Air quality control regions

(d) Designations.

(1) Designations generally.

(A) Submission by Governors of initial designations following promulgation of new or revised standards.

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 109 [42 USCS § 7409], the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as--

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or

portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1) (A), (B), or (C) of this subsection (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under theprovisions of paragraph (1)(D) (as in effect immediately before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4)or (5) shall not be subject to the provisions of sections 553 through 557 of title 5 of the United States Code (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B)(or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion

thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless--

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 110(k) [42 USCS § 7410(k)];

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the

applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A [42 USCS § 7505a]; and

(v) the State containing such area has met all requirements applicable to the area under section 110 and part D [42 USCS § 7410 and §§ 7501 et seq.].

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary,

in the same manner, and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

42 U.S.C. § 7408 Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants.

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970] publish, and shall from time to time thereafter revise, a list which includes each air pollutant--

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on--

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant:

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

42 U.S.C. § 7409. National primary and secondary ambient air quality standards

(a) Promulgation.

(1) The Administrator--

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall be regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare.

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

***

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions.

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 [*42 USCS § 7408]* and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 108 [*42 USCS § 7408]* and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2) (A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 108 [*42 USCS § 7408]* and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 108 [*42 USCS § 7408]* and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts

necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

§ 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates.

(1) Classifications.

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 107(d) [*42 USCS § 7407*(d)] with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of title 5 of the United States Code (concerning notice and

comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 110 [*42 USCS § 7410*(k) or (l)] (concerning action on plan submissions) or section 179 [*42 USCS § 7509]* (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part [*42 USCS § § 7501* et seq.].

(2) Attainment dates for nonattainment areas.

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 107(d) [*42 USCS § 7407*(d)], except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 107(d) [*42 USCS § 7407*(d)].

***

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part [*42 USCS § § 7501* et seq.].

(b) Schedule for plan submissions.

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 107(d) [*42 USCS § 7407*(d)], the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) and section 110(a)(2) [*42 USCS § 7410*(a)(2)]. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) and section 110(a)(2) [*42 USCS § 7410*(a)(2)].

42 U.S.C. § 7511. Classifications and attainment dates

(a) Classification and attainment dates for 1989 nonattainment areas.

(1) Each area designated nonattainment for ozone pursuant to section 107(d) [42 USCS § 7407(d)] shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall

be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	*Design value**	*Primary standard attainment date***
Marginal	0.121 up to 0.138	3 years after November15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	280 and above	20 years after November 15, 1990

*The design value is measured in parts per million (ppm).

**The primary standard attainment date is measured from the date of the enactment of the Clean Air Amendments of 1990.

(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after the date of the enactment of the Clean Air Amendments of 1990.

(3) At the time of publication of the notice under section 107(d)(4) [42 USCS § 7407(d)(4)] (relating to area designations) for each ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 172(a)(1)(B) [42 USCS § 7502(a)(1)(B)] (relating to lack of notice and comment and judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in

the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if–

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year.

No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 107(d)(4) [42 USCS § 7407(d)(4)], and that is subsequently redesignated to nonattainment for ozone under section 107(d)(3) [42 USCS § 7407(d)(3)], shall, at the

time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a). Upon its classification, the area shall be subject to the same requirements under section 110, subpart 1 of this part, and this subpart [42 USCS §§ 7410, 7501 et seq., 7511 et seq.] that would have applied had the area been so classified at the time of the notice under subsection (a)(3), except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between the date of the enactment of the Clean Air Act Amendments of 1990 and the date the area is classified under this paragraph.

(2) Reclassification upon failure to attain

(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) to the higher of –

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B).

No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, nolater than 6 months following the attainment date, identifying each area that the Administrator has determined

under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

REGULATORY PROVISIONS

40 C.F.R. § 50.6 National primary and secondary ambient air quality standards for PM[10].

(a) The level of the national primary and secondary 24-hour ambient air quality standards for particulate matter is 150 micrograms per cubic meter ($\mu g/m^3$), 24-hour average concentration. The standards are attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu g/m^3$, as determined in accordance with appendix K to this part, is equal to or less than one.

(b) The level of the national primary and secondary annual standards for particulate matter is 50 micrograms per cubic meter ($\mu g/m^3$), annual arithmetic mean. The standards are attained when the expected annual arithmetic mean concentration, as determined in accordance with appendix K to this part, is less than or equal to 50 $\mu g/m^3$.

c) For the purpose of determining attainment of the primary and secondary standards, particulate matter shall be measured in the ambient air as PM10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by:

(1) A reference method based on appendix J and designated in accordance with part 53 of this chapter, or

(2) An equivalent method designated in accordance with part 53 of this chapter.

(d) The PM[10] standards set forth in this section will no longer apply to an area not attaining these standards as of

September 16, 1997, once EPA takes final action to promulgate a rule pursuant to section 172(e) of the Clean Air Act, as amended (42 U.S.C. 7472(e)) applicable to the area. The PM[10] standards set forth in this section will no longer apply to an area attaining these standards as of September 16, 1997, once EPA approves a State Implementation Plan (SIP) applicable to the area containing all PM[10] control measures adopted and implemented by the state prior to September 16, 1997, and a section 110 SIP implementing the PM standards published on July 18, 1997. SIP approvals are codified in 40 CFR part 52.

40 C.F.R. § 50.7 National primary and secondary ambient air quality standards for particulate matter.

(a) The national primary and secondary ambient air quality standards for particulate matter are:

(1) 15.0 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 65 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as PM[2.5] (particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers) by either:

(i) A reference method based on Appendix L of this part and designated in accordance with part 53 of this chapter; or

(ii) An equivalent method designated in accordance with part 53 of this chapter.

(2) 50 micrograms per cubic meter ($\mu g/m^3$) annual arithmetic mean concentration, and 150 $\mu g/m^3$ 24-hour average concentration measured in the ambient air as PM[10] (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by either:

(i) A reference method based on Appendix M of this part and designated in accordance with part 53 of this chapter; or

(ii) An equivalent method designated in accordance with part 53 of this chapter.

(b) The annual primary and secondary PM[2.5] standards are met when the annual arithmetic mean concentration, as determined in accordance with Appendix N of this part, is less than or equal to 15.0 micrograms per cubic meter.

(c) The 24-hour primary and secondary PM[2.5] standards are met when the 98th percentile 24-hour concentration, as determined in accordance with Appendix N of this part, is less than or equal to 65 micrograms per cubic meter.

(d) The annual primary and secondary PM[10] standards are met when the annual arithmetic mean concentration, as determined in accordance with Appendix N of this part, is less than or equal to 50 micrograms per cubic meter.

(e) The 24-hour primary and secondary PM[10] standards are met when the 99th percentile 24-hour concentration, as determined in accordance with Appendix N of this part, is less than or equal to 150 micrograms per cubic meter.

40 C.F.R. § 50.9 National 1-hour primary and secondary ambient air quality standards for ozone.

(a) The level of the national 1-hour primary and secondary ambient air quality standards for ozone measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.12 parts per million (235 $\mu g/m^3$). The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million ($\mu g/m^3$) is

equal to or less than 1, as determined by Appendix H to this part.

(b) The 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard. Area designations are codified in 40 CFR part 81.

40 C.F.R. § 50.10 National 8-hour primary and secondary ambient air quality standards for ozone.

(a) The level of the national 8-hour primary and secondary ambient air quality standards for ozone, measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.08 parts per million (ppm), daily maximum 8-hour average.

(b) The 8-hour primary and secondary ozone ambient air quality standards are met at an ambient air quality monitoring site when the average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm, as determined in accordance with Appendix I to this part.

Supreme Court, U.S.
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No. 99-1263

In The

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE OF AMERICAN LUNG ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI BY THE COMMONWEALTH OF MASSACHUSETTS

Respondent American Lung Association (ALA) supports the petition of the Commonwealth of Massachusetts, *et al.*, for a writ of certiorari to review the court of appeals' rulings concerning both the nondelegation doctrine and the implementation of the new eight-hour national ambient air quality standards for ozone. Indeed, ALA has filed its own petition for certiorari concerning those two rulings. *American Lung Assn. v. American Trucking Assns.*, No. 99-1265.

ALA has no parent companies or nonwholly owned subsidiaries, and there is no parent or publicly held company owning 10% or more of ALA's stock.

DATED: February 16, 2000

Respectfully submitted,

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Supreme Court, U.S.
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(4) (3) (2)

Nos. 99-1257, 99-1263, 99-1265

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN RESPONSE FOR THE RESPONDENTS APPALACHIAN POWER CO., *et al.*

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency ("EPA" or "the Agency") revised National Ambient Air Quality Standards ("NAAQS") promulgated under Section 109 of the Clean Air Act, 42 U.S.C. § 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act which resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation under "Subpart 1" of the Clean Air Act.

3. Whether this Court should grant certiorari to review the D.C. Circuit's unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of ozone NAAQS.

PARTIES TO THE PROCEEDINGS

1. CAA Industry Respondents are petitioners in one or both of the two consolidated cases addressed by this conditional cross-petition for a writ of certiorari: *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases), and *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1441 (and consolidated cases).

    Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)

    American Forest & Paper Association

    American Iron & Steel Institute

    American Petroleum Institute

    American Public Power Association

    Appalachian Power Co., *et al.* is comprised of the following:

        Baltimore Gas and Electric Company

        Carolina Power & Light Company

        Central and South West Services, Inc.

            Central Power and Light Company

            Public Service Company of Oklahoma

            Southwestern Electric Power Company

            West Texas Utilities Company

        Central Illinois Public Service Company

        CINergy Corp.

        Columbus Southern Power Company

        Conectiv (petitioned as Delmarva Power & Light Co. and intervened as Atlantic City Electric Co. in the cases below)

Consumers Energy Company
Dayton Power and Light Company, The
Detroit Edison Company, The
Duke Energy Co.
FirstEnergy (petitioned as Ohio Edison Co. and Centerior Energy Co., (with Centerior Energy Co. subsidiaries Cleveland Electric Illuminating Co. & Toledo Edison Co.) in the cases below)
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
LGE Energy Corp. (petitioned as Kentucky Utilities Company and Louisville Gas & Electric Co. in the cases below)
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company,
dba Allegheny Power System, Inc.
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
PacifiCorp
PPL Electric Utilities Corporation
dba PPL Utilities (petitioned as Pennsylvania Power & Light Corp.)
Plains Electric Generation & Transmission

Cooperative, Inc.
Potomac Edison Company, The
dba Allegheny Power System, Inc.
Potomac Electric Power Company
Public Service Company of New Mexico
Salt River Project
South Carolina Electric & Gas Company
Southern Company
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Tampa Electric Company
Union Electric Company
Virginia Power
West Penn Power Company
dba Allegheny Power System, Inc.
Wisconsin Electric Power Company
and
Edison Electric Institute
National Rural Electric Cooperative Association
Chemical Manufacturers Association
Meridian Gold Company
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association
(petitioned as National Petroleum Refiners Association in the case below)
Nevada Mining Association
Newmont Gold Co.

Phoenix Cement Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

2. The following parties are petitioners in one or both of the two consolidated cases addressed by this brief in response, but have not joined CAA Industry Respondents in filing this brief in response.

American Farm Bureau Federation
American Portland Cement Alliance
American Trucking Associations, Inc.
James Bassage
Burns Motor Freight, Inc.
Central Illinois Light Co.
Chamber of Commerce of the United States of America
Citizens for Balanced Transportation
Commonwealth Edison
Duquesne Light Co.
Equipment Manufacturers Institute
Garner Trucking, Inc.
Genie Trucking Line, Inc.
Gloucester Company, Inc.
Michael Gregory
Idaho Mining Association
Judy's Bakery, Inc.
Kennecott Energy and Coal Company
Kennecott Holdings Corporation
Kennecott Services Company
David Matusow
Brian McCarthy
National Association of Manufacturers

National Automobile Dealers Association
National Coalition of Petroleum Retailers
National Indian Business Association
National Small Business United
National Stone Association
Non-Ferrous Founders' Society
Oklahoma Gas & Electric
Richard Romero
Small Business Survival Association
State of Michigan
State of Ohio
State of West Virginia

3. Petitioner United States Environmental Protection Agency was the respondent in all of the proceedings below.

4. The following parties were intervenors in one or both of the two consolidated cases addressed by this brief in response.

American Lung Association
American Road and Transportation Builders Association
Atlantic City Electric Company
Commonwealth of Massachusetts
State of New Jersey

5. The following parties appeared as *amici curiae* in one or both of the two consolidated cases addressed by this brief in response.

Representative Tom Bliley

Senator Orrin G. Hatch
State of Connecticut
State of New Hampshire
State of New York
State of Vermont

RULE 29.6 DISCLOSURE STATEMENT

1. The following list of CAA Industry Respondents hereby discloses the parent companies of respondents and any publicly held companies that own 10% or more of respondents' stock.

Alabama Power Company
(a subsidiary of Southern Company)
Appalachian Power Company
(a subsidiary of American Electric Power Company, Inc.)
Baltimore Gas and Electric Company
(a subsidiary of Constellation Energy Group, Inc.)
Central and South West Services, Inc.
(a subsidiary of Central and South West Corporation)
Central Illinois Public Service Company
(a subsidiary of Ameren Corporation)
Central Power and Light Company
(a subsidiary of Central and Southwest Corporation)
Columbus Southern Power Company
(a subsidiary of American Electric Power Company, Inc.)
Consumers Energy
(a subsidiary of CMS Energy Corporation)
Dayton Power & Light Company, The
(a subsidiary of DPL Inc.)
Florida Power Corporation
(a subsidiary of Florida Progress Corporation)
Georgia Power Company

(a subsidiary of Southern Company)
Gulf Power Company
(a subsidiary of Southern Company)
Illinois Power
(a subsidiary of Illinova Inc.)
Indiana Michigan Power Company
(a subsidiary of American Electric Power Company, Inc.)
Indianapolis Power & Light Company
(a subsidiary of IPALCO Enterprises, Inc.)
Kentucky Power Company
(a subsidiary of American Electric Power Company, Inc.)
Mississippi Power Company
(a subsidiary of Southern Company)
Monongahela Power Company
(a subsidiary of Allegheny Energy, Inc.)
Northern Indiana Public Service Company
(a subsidiary of NiSource Inc.)
Ohio Power Company
(a subsidiary of American Electric Power Company, Inc.)
Potomac Edison Company, The
(a subsidiary of Allegheny Energy, Inc.)
Public Service Company of Oklahoma
(a subsidiary of Central and Southwest Corporation)
Savannah Electric & Power Company
(a subsidiary of Southern Company)
South Carolina Electric & Gas Company
(a subsidiary of SCANA Corporation)
Southwestern Electric Power Company
(a subsidiary of Central and Southwest

Corporation)
Tampa Electric Company
(a subsidiary of TECO Energy, Inc.)
Union Electric Co. (a subsidiary of Ameren Corp.)
Virginia Power
(a subsidiary of Dominion Resources, Inc.)
West Penn Power Company
(a subsidiary of Allegheny Energy, Inc.)
West Texas Utilities Company
(a subsidiary of Central and South West Corporation)
Wisconsin Electric Power Company
(a subsidiary of Wisconsin Energy Corporation)

2. The following CAA Industry Respondents have no parent corporations, and no publicly-held companies have a 10% or greater ownership interest in these respondents.

Alliance of Automobile Manufacturers (petitioned as American Automobile Manufacturers Association in the cases below)
American Forest & Paper Association
American Iron & Steel Institute
American Petroleum Institute
American Public Power Association
Carolina Power & Light Co.
CINergy Corp.
Chemical Manufacturers Association
Conectiv
Detroit Edison Co.
Duke Energy Corp.
Edison Electric Institute
FirstEnergy Corp.

Jacksonville Electric Authority
Kansas City Power & Light Co.
LGE Energy Corp.
Madison Gas and Electric Co.
Meridian Gold Co.
Minnesota Power
Midwest Ozone Group
National Association of Home Builders
National Mining Association
National Paint and Coatings Association
National Petrochemical & Refiners Association (formerly National Petroleum Refiners Association)
National Rural Electric Cooperative Association
Nevada Mining Association
Newmont Gold Co
Oglethorpe Power Corp.
Ohio Valley Elec. Corp.
Ottertail Power Co.
PacifiCorp
PP&L Electric Utilities Corporation dba PPL Utilities
Phoenix Cement Company
Plains Electric Generation & Transmission Cooperative, Inc.
Potomac Electric Power Co.
Public Service Company of New Mexico
Salt River Project
Southern Company
United Mine Workers of America, AFL-CIO
West Virginia Chamber of Commerce
Western Fuels Association, Inc.

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BRIEF IN RESPONSE TO PETITIONS FOR CERTIORARI

On May 14, 1999, the United States Court of Appeals for the District of Columbia Circuit remanded to the United States Environmental Protection Agency ("EPA" or "the Agency") the Agency's revised National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter ("PM"). EPA has petitioned for a writ of certiorari (No. 99-1257) on parts of that decision, as confirmed and clarified upon rehearing on October 29, 1999. The American Lung Association ("ALA") (No. 99-1265) and the states of Massachusetts and New Jersey ("State Petitioners") (No. 99-1263) have filed petitions seeking review of the same issues. This response is being filed on behalf of trade associations representing most of the major industries in this country, including the utility industry, automobile industry, coal industry, mining industry, oil industry, iron and steel industry, chemical industry, paper industry, paint and coating industry and home building industry; over 50 individual companies; and other organizations (hereinafter referred to as "CAA Industry Respondents"). These companies and organizations are listed on the cover to this brief.

This Court should deny these petitions as to the lower court's holding on Subpart 2 to Part D of Title I of the Clean Air Act ("CAA"). As to the questions Petitioners present regarding the "nondelegation" holding, if certiorari is granted, it must encompass review of the lower court's

decision limiting the factors that may be considered by EPA on remand in developing an "intelligible principle."[1]

STATEMENT OF THE CASE

1. *The NAAQS Program* – Section 108(a), EPA App. 109a-110a, provides for regulation of an ambient air pollutant that "endangers" public health. Under §§ 108 and 109 of the Act, EPA App. 109a-113a, NAAQS are to be based on a "criteria document," that "accurately reflects the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare" associated with the presence of a pollutant in the ambient air. Under § 109(b), State App. 102, "primary" NAAQS are set at a level that, allowing an "adequate margin of safety," is "requisite to protect the public health." Secondary standards are set at a level that is "requisite to protect the public welfare from known or anticipated adverse effects." Under § 109(d), State App. 102, NAAQS may be revised periodically "as may be appropriate" in accordance with § 108 and § 109(b).

2. *The EPA Rulemaking* – In the case below, CAA Industry Respondents challenged EPA's decision to establish new "public health" policy under § 108 and § 109 of the Clean Air Act as reflected in its decision (1) to revise the existing NAAQS for ozone and PM, and (2) to replace the ozone reduction program enacted by Congress in 1990 based on the 1-hour NAAQS (the "Subpart 2" program, CAA Industry Cross-Petitioners App. ("ICP App.") 2a-62a) with a

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[1] Out of an excess of caution, a Conditional Cross-Petition for Certiorari addressing this issue is being filed today. The companies and organizations joining in that Cross-Petition ("CAA Industry Cross-Petitioners") are listed on the cover of that petition.

different program to be developed by EPA under the general planning requirements of Subpart 1 of the Act and based on a new 8-hour ozone NAAQS.

While EPA and other petitioners claim these standards are needed to address serious health risks, the record below presents a very different picture. With respect to the ozone NAAQS, EPA's independent science advisers (the Clean Air Scientific Advisory Committee or "CASAC")[2] concluded, based on their extensive review of the science, that none of the ozone levels that were considered for the revised NAAQS (including the existing ozone NAAQS) could be distinguished as significantly more protective of public health than the others.[3] EPA's staff similarly observed that a standard equivalent to the existing 1-hour NAAQS "would reduce estimated exposure of the at-risk population sufficiently to provide some margin of safety."[4]

As for PM, the same independent science advisers could form *no* consensus on the level, averaging time or form of a revised PM NAAQS because of many uncertainties regarding the existence and nature of any causal relationship between public health, on the one hand, and the fine particle indicator

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[2] CASAC is the independent body created by Congress to provide scientific advice to EPA on NAAQS decisions. *See* CAA § 109(d)(2), EPA App. 112a.

[3] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236, ("[T]he Panel concluded that there is no 'bright' which distinguishes any of the proposed standards . . . as being significantly more protective of public health.").

[4] EPA, Review of the National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information 167 (1996) ("Staff Paper"), Ozone JA 1790.

("$PM_{2.5}$") chosen for the revised NAAQS, on the other.[5] Given these uncertainties and the lack of air quality data for $PM_{2.5}$, the Administration delayed implementation of the $PM_{2.5}$ NAAQS until at least 2002 so that the revised standard could be reevaluated.[6]

The uncertain science regarding possible health effects associated with exposure to extremely low ambient concentrations of these substances,[7] coupled with EPA's assumption that there is no threshold for effects for these substances, made it impossible to distinguish among the range of alternative standard levels based on public health protection alone.[8] EPA's decisions to revise these NAAQS

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[5] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (June 13, 1996), PMJA 3167 ("The diversity of opinion . . . reflects the many unanswered questions and uncertainties associated with establishing causality of the association between $PM_{2.5}$ and mortality."); *see also* 62 Fed. Reg. 38,689 n.90 (suggesting a lack of direct evidence of a relationship between long-term $PM_{2.5}$ exposure and health effects).

[6] The President, Memorandum of July 16, 1997, "Implementation of Revised Air Quality Standards for Ozone and Particulate Matter," 62 Fed. Reg. 38,421 (1997), ICP App. 72a. This decision was codified by Congress. *See* Transportation Equity Act for the 21st Century § 6101, Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a.

[7] In the case of ozone, for example, EPA's science advisers observed that the revised standard would regulate concentrations approaching background levels. CASAC Tr. (March 22, 1995) at 296, Ozone JA 278; Comments by George T. Wolff (March 27, 1995), at 4, Ozone JA 383; Staff Paper at 20, Ozone JA 1830.

[8] *See, e.g.*, 62 Fed. Reg. 38,883 (ozone); 62 Fed. Reg. 38,688 (PM) (the Administrator's margin of safety determinations "are largely judgmental in nature, particularly with respect to nonthreshold pollutants, and may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric.").

therefore were driven not by science, but by the Administrator's policy judgment, unbounded by any intelligible principle, as to how much protection is "sufficient[]" in light of "[u]ncertainties associated with inconclusive scientific and technical information" and "hazards that research has not yet identified."[9] Furthermore, these policy judgments were exercised against a background of declining pollutant concentrations due to CAA programs already in place.[10]

In exercising this policy judgment, EPA explained at length factors that it asserted were *not* relevant to its decision[11] and then identified several health-related factors that it did consider.[12] EPA wholly failed, however, to articulate any principle that would guide the exercise of its discretion in

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[9] 62 Fed. Reg., 38,857, (ozone); 62 Fed. Reg. 38,653 (PM).

[10] *See, e.g.*, EPA, *National Air Quality and Emissions Trends Report, 1995* at 1, 61 (1996), PMJA 4152-53 (ambient PM_{10} concentrations decreased by 22 percent between 1988 and 1995 and the number of areas designated nonattainment for ozone decreased by 30% between 1990 and 1996).

[11] These factors included the cost and technological feasibility of controls, the disruptive impact of replacing the congressional ozone reduction program with a new program to be devised by EPA, and the public health "disbenefits" of more restrictive standards. 62 Fed. Reg. 38,878-83, 38,884-85 (ozone); 62 Fed Reg. 38,683-89 (PM); *Responses to Significant Comments on the National Ambient Air Quality Standards for Ozone* 128-33 (July 1997), Ozone JA 210-15; EPA, *Responses to Significant Comments on the 1996 Proposed Rule on the National Ambient Air Quality Standards for Particulate Matter* 112 (July, 1997), PMJA 312.

[12] The factors that EPA did consider included the magnitude and severity of health effects, uncertainty in the data, and the size of the sensitive population. EPA Pet. 15 n.9, EPA App. 7a.

choosing, based on these health-related factors, from among air quality levels that could not be distinguished from a public health protection standpoint. It simply asserted that where there is scientific uncertainty, the courts must defer to the Administrator's "reasoned" judgment even if the Agency articulates no principle for assessing whether the resulting standard is reasonable.[13]

As a result, the revised NAAQS reflected EPA's interpretation of § 109 to provide no intelligible criteria to guide the Administrator's risk management decisions. Following this theory, the Administrator's discretion in choosing among health protective alternatives was unconstrained, for example, by EPA's own analyses showing that the costs to society of the revised ozone NAAQS would significantly outweigh its benefits.[14]

Finally, as a result of the failure of the pre-1990 Clean Air Act program to reduce ozone under the general planning authority of Subpart 1 of Part D, Title I of the Act, Congress in 1990 enacted a detailed statutory program as Subpart 2 to Part D. This new statutory ozone reduction program was based on the existing 1-hour NAAQS and reflected Congress' judgment that addressing the public health risks associated with low-level ozone exposures does not require inflexible attainment deadlines or massive economic or social

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[13] *See, e.g.*, 62 Fed. Reg. 38,883, (ozone); 62 Fed. Reg. 38,688 (PM).

[14] *See* EPA, *Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule* ES-12, ES-17, ES-20 (July 16, 1997), Ozone JA 2919, 2924, 2927 ("RIA"). In the case of the revised PM NAAQS, EPA estimated the cost of attainment at $37 billion annually. *Id.* at 9-1, Ozone JA 2934.

dislocation – aspects of the pre-1990 Subpart 1 ozone reduction program that made that program unworkable.[15]

The statutory Subpart 2 program includes specific strategies and timetables, based on the existing 1-hour ozone NAAQS, for reducing ground-level ozone concentrations. It applies to both nonattainment and attainment areas.[16] And it explains how to regulate areas that are now in attainment but that may have deteriorating air quality and become nonattainment areas in the future.[17]

To avoid any confusion about how ozone reductions were to be achieved under the Clean Air Act, Congress provided in § 181(a) of Subpart 2 that "each area designated nonattainment for ozone pursuant to § 107(d)" – a provision that governs designation of *all* existing and future ozone nonattainment areas as a prerequisite for regulating that area under the Act – "shall be classified at the time of such designation, under table 1, *by operation of law*" and then regulated according to its Subpart 2 classification. CAA § 181(a), EPA App. 117a (emphasis added). In this way Congress blocked EPA from initiating an alternative ozone reduction program under Subpart 1 based on a more stringent ozone NAAQS.

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[15] *See* 1 Sen. Comm. on Env. & Pub. Works, *A Legislative History of the Clean Air Act Amendments of 1990*, 1236-37 (Comm. Print, 1993) ("1990 Legis. Hist."), (H.R. Debate Oct. 26, 1990, statement of Rep. Fields); H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. at 3169-72, 3253-82.

[16] *See, e.g.*, CAA § 184(b), ICP App. 55a-56a (requiring specific implementation measures in attainment areas of states within an ozone transport region).

[17] *See* CAA § 181(b)(1), EPA App. 119a-120a.

Despite this clear statutory language, EPA in its final rule revising the ozone NAAQS promulgated a provision (40 C.F.R. § 50.9(b), State App. 113) authorizing EPA to revoke the congressional Subpart 2 program for areas that have air quality meeting the 1-hour NAAQS. The provision requires EPA to replace the Subpart 2, 1-hour NAAQS-based regulatory program in these areas with a program that EPA would develop for the revised 8-hour NAAQS under the general planning requirements of Subpart 1,[18] the approach Congress *rejected* in adopting Subpart 2. Pursuant to that provision, EPA subsequently revoked the 1-hour NAAQS and Subpart 2 program in a number of areas.[19]

3. *The Lower Court's Opinion* -- Because of the various flaws in EPA's reasoning summarized above, on May 14, 1999, a panel of the D.C. Circuit remanded the revised NAAQS for ozone and PM to EPA. First, after a thorough review of the record, the panel concluded that, because the Administrator's interpretation of § 109 failed to provide *any* intelligible principle for exercising public health policy judgment in response to uncertain and inconclusive science (i.e., because her interpretation of § 109 "[f]ail[ed] to state intelligibly how much [risk] is too much"), the Administrator's interpretation would render this provision an unconstitutional delegation of authority. EPA App. 5a-6a. The court did *not* hold the statute itself unconstitutional but rather remanded the NAAQS for EPA to exercise the discretion delegated to it by Congress to interpret § 109 in a

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[18] 62 Fed. Reg. 38,873, ICP App. 74a-75a.

[19] *See, e.g.*, 64 Fed. Reg. 30,911 (1999); 63 Fed. Reg. 31,014 (1998); 63 Fed. Reg. 39,432 (1998).

way that provides intelligible criteria for implementing it. EPA App. 14a.

Second, the court rejected EPA's interpretation of the CAA as prohibiting consideration of the protective effect of ozone in the ambient air with respect to ultraviolet B ("UVB") radiation when it establishes an ozone NAAQS. According to the court, "it seems bizarre that a statute intended to improve human health would, as EPA claimed at argument, lock the agency into looking at only one half of a substance's health effects."[20] EPA does not seek review of this part of the lower court's decision.

Third, the panel rejected EPA's legal conclusion, embodied in § 50.9(b) of the rule, State App. 113, that EPA had authority to rewrite the congressional ozone reduction program. The court relied on the plain language of the statute directing that the congressional Subpart 2 program apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the CAA – explicit language that the court found dispositive under the first prong of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). EPA App. 38a. On this basis, the court held that EPA could enforce a revised ozone NAAQS only "under Subpart 2," EPA App. 43a, and that the Agency was precluded "from requiring areas to comply either more quickly *or with a more stringent NAAQS*." EPA App. 40a (emphasis added).[21]

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[20] EPA App. 47a. Respondents also raised the public health disbenefits issue as to the revised PM NAAQS and EPA rejected those comments on the same grounds that it relied upon in refusing to consider the issue in the ozone rulemaking.

[21] In another part of its opinion that has gone unchallenged, the panel vacated the revised coarse PM standards. EPA App. 53a, 57a-58a.

On October 29, 1999, the D.C. Circuit panel rejected EPA's petition for rehearing, except for minor editing which, *inter alia*, clarified and confirmed that portion of the panel's decision concerning the role of Subpart 2 in implementation of any revised primary ozone NAAQS.[22] The D.C. Circuit then *unanimously* rejected EPA's *en banc* petition on the public health disbenefits and Subpart 2 issues of statutory construction, both of which were independent grounds for remanding the revised ozone standard.[23]

EPA's petition for certiorari followed.

REASONS FOR REJECTING THE "NON-DELEGATION" QUESTION PRESENTED BY EPA AND FOR DENYING THE PETITIONS FOR CERTIORARI ON THE SUBPART 2 HOLDING

I. THE "NONDELEGATION" QUESTION PRESENTED BY EPA, ALA AND STATE PETITIONERS DOES NOT WARRANT REVIEW.

After careful review of a complex record, the court below concluded that EPA had not applied any "intelligible principle" in deciding whether and how to revise the ozone and PM NAAQS. It therefore remanded the cases to allow EPA to identify such a principle.

While the D.C. Circuit correctly held that EPA's interpretation of the Act requires remand to develop an "intelligible principle" to manage risk, EPA App. 14a, it

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[22] EPA App. 70a-82a.

[23] Those judges who dissented from the court's denial of rehearing *en banc* mentioned only the nondelegation issue. *See* EPA App. 91a-99a.

erred in precluding EPA from considering other burdens on society, including the economic and indirect public health consequences of NAAQS decisions, as part of the "intelligible principles" for risk management decisions under § 109. EPA App. 19a-22a. As explained in the Conditional Cross-Petition also being filed in this case, the "adequate margin of safety" language in § 109(b), EPA App. 111a, the "as may be appropriate" language in § 109(d), EPA App. 112a, and the "purposes" section of the Act, ICP App. 1a, permit the Agency to consider the broad economic and social consequences of CAA § 109 risk management decisions.

As a result, although CAA Industry Respondents disagree that the nondelegation question presented by the Government and others makes this case worthy of review by this Court, they believe that if this Court reviews the "nondelegation" holding of the lower court, it must review the scope of EPA's discretion to manage risk under § 109 of the Act.

A. The Question Presented by EPA and Other Petitioners Presents No Conflict With Supreme Court Precedent or With Any Important Principle of Law.

To read the question presented and the arguments of the Government and other petitioners, one would think that the D.C. Circuit had struck down an act of Congress and held that Congress may no longer legislate in broad terms. But that is not what the court of appeals did. All it did was to hold that *EPA's construction* of a statute is inadequate until EPA reveals its principle of decision, and then it remanded the rules to EPA to articulate such a principle. EPA App. 5a, 14a. This by itself is unexceptional, and no "compelling reason[]" for Supreme Court review. Sup. Ct. R. 10.

Indeed, the court could not have done less, faced with EPA's radical view of its own authority. EPA argues that to issue a legally valid decision it need only consider factors it deems relevant. This, EPA explains, is satisfied merely by EPA's discussion of relevant evidence in the *Federal Register*. EPA Pet. 13-14. After that, all is "judgment." In other words, EPA can decide whatever it wants, so long as it has examined an appropriate set of data. Just as the National Environmental Policy Act is "essentially procedural,"[24] EPA hopes to make its own rulemaking obligation under § 109 of the Clean Air Act "essentially procedural."

This is EPA's position, but it is not the law of agency rulemaking and never has been. EPA's view of its role imposes no *substantive* standard on agency rulemaking at all, only the *procedural* requirement that relevant evidence be considered in a decisional vacuum. As this novel theory suggests, agency "judgment" becomes a mysterious process that cannot ultimately be explained but must issue oracle-like from the agency's mouth. "Pay no attention to that man behind the curtain," says the Agency; "I have considered the relevant evidence."

We repeat: All the court required here was that the agency explain its reasoning. Some have argued that the constitutional "nondelegation" rationale for remand in this case might as well have been articulated as "arbitrary and capricious" agency action[25] – that EPA failed to state a

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[24] *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

[25] Craig Oren, "Run Over by *American Trucking* Part I: Can EPA Revive its Air Quality Standards?", 29 Envtl. L. Rep. (Envtl. L. Inst.) 10,653, 10,658 (Nov. 1999).

rational basis for its decision.[26] Whatever the rationale, the proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review.

In support of its petition, EPA observes that "Congress does not violate the constitution 'merely because it legislates in broad terms.'" EPA Pet. 12. But from this uncontroversial principle, EPA goes on to argue that because Congress wrote § 109 in broad terms, EPA actions implementing § 109 must be upheld – even if EPA interprets § 109 to provide no criteria to guide its discretion. EPA Pet. 11-12. According to EPA, to rule otherwise would be a "striking departure from this Court's nondelegation jurisprudence." EPA Pet. 11.

Not at all. In an attempt to manufacture a basis for certiorari, EPA attacks a strawman. The lower court did *not* question Congress' authority to legislate in broad terms, and neither do we. Nor did the court hold that § 109 is unconstitutional. Rather, in response to EPA's repeated and strenuous rejections of any reading of § 109 that would provide principles to guide the Agency's choice among alternative standards, the lower court found that EPA's *interpretation* of § 109 – not the statute on its face – reflects an unconstitutional delegation. The court therefore remanded the rules before it to permit the Agency to exercise the discretion given it by Congress in § 109 to interpret and to implement this broad delegation of authority.[27]

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[26] *See* CAA § 307(d)(9), EPA App. 126a ("arbitrary and capricious" standard).

[27] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 865 (1984) (Where "Congress has not directly addressed

There is nothing remarkable about this. Courts have frequently required an agency to articulate the legal principles that guide its discretion when it adopts, or refuses to revise, legislative rules.[28] Indeed, we are aware of no decision, by this Court or any other, that has permitted an agency to construe its enabling statute so that no intelligible principle governs the agency's exercise of rulemaking discretion.

This Court has always demanded that agencies be guided by an intelligible principle, as even Petitioner ALA concedes.[29] *See Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For example, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980), the Court found that the agency had provided no intelligible principle for setting standards under § 6(b)(5) of the Occupational Safety and Health Act ("OSHA"). The Court nevertheless found that an intelligible principle could be discerned when this provision was read along with the definitions in the Act (OSHA § 3(8)) and

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the precise question at issue," it is for the agency to construe the statute "within the limits of [the congressional] delegation.").

[28] *See infra* notes 33 - 35 and accompanying text.

[29] *See* ALA Pet. 18 (ALA concedes that "the precedent of this Court . . . requires . . . an 'intelligible principle'" to guide statutory implementation, but argues that the lower court in its explanation of this established principle demands too much precision from EPA).

therefore remanded the case. *Id.* at 641.[30] Curiously, EPA in its petition does not even mention *Industrial Union.* Nor does EPA discuss the other key case on which the lower court relied *(International Union, UAW v. OSHA)*[31] – a case in which the Government did not even seek certiorari.[32]

Therefore, while EPA argues that the lower court has questioned Congress' authority to legislate "in broad terms," it did nothing of the kind. It simply confirmed that when EPA acts pursuant to a broad delegation of authority, EPA's first and most critical obligation is to enunciate, under the second prong of *Chevron,* the legal standard it applies in exercising the discretion given it by Congress. Where an agency misconstrues the scope of the discretion delegated by Congress, it acts unlawfully.[33]

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[30] Petitioner ALA's reliance on this case, *see* ALA Pet. 19, is misplaced, because this case adopts the same method of analysis as applied by the lower court in *ATA*.

[31] 938 F.2d 1310 (D.C. Cir. 1991).

[32] By contrast, petitioners cite a number of cases, including *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946), *U.S. v. Henry*, 136 F.3d 12, 17 (1st Cir. 1998), and *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974), in which statutes delegating broad authority were found constitutional because the language of the statute, its purposes, its factual background and context bounded administrative discretion. Similarly, in this case, the court below did *not* find the CAA unconstitutional; it simply remanded this case for EPA to exercise the discretion delegated to it by Congress. *Cf. South Terminal Corp.* 504 F.2d at 670 (The court set aside a key provision of the rule at issue as "standardless").

[33] *See, e.g., SEC v. Chenery*, 332 U.S. 194, 196-97 (1947); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 109 (1970); *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).

Reflecting these established principles, judicial decisions commonly set aside agency orders because the agency failed to apply the correct legal standard when it promulgated a rule or took some other action.[34] Similarly, where an agency construes a statute to provide *no legal standard at all* to constrain its discretion, the courts have rejected such a construction because of the "nondelegation" principle.[35] Remanding the case for EPA to develop an intelligible principle for risk management decisions is therefore fully in keeping with the law of this Court.[36]

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[34] For example, in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-19 (1944), Congress authorized the agency to define "area of production" in geographic terms, leading the Court to disapprove a regulation dependent on the number of workers involved instead. *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1055 (D.C. Cir. 1995); *Alabama Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994); *Alabama Power Co. v. Costle*, 636 F.2d 323, 355 (D.C. Cir. 1980).

[35] *See, e.g., National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342-43 (1974); *International Union, UAW v. OSHA*, 938 F.2d 1310, 1313; *see also AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 734-35 (1999).

[36] *See Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) (nondelegation doctrine requires narrow construction of statutes that might otherwise be unconstitutional); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. at 646 (plurality opinion) (agency should be allowed to characterize statute in a way to avoid unconstitutional delegation); *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. at 342 ("the hurdles revealed in [*A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)] lead us to read the [Independent Offices Appropriation Act] to avoid constitutional problems"); *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965) (construing statute so as to avoid an invalid delegation); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (the act in question does "not delegate to the Secretary the kind of authority exercised"); *see also Loving v. United States*, 517 U.S. 748, 758

EPA should not have been surprised by this remand, for it had ample warning in the case law of the lower court. In an earlier case addressing NAAQS, the D.C. Circuit anticipated that in future cases "EPA might be required to explain the risk it considered tolerable." *Natural Resources Defense Council v. EPA*, 902 F.2d 962, 974 (1990). Just such a case arose in *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998), *cert. denied*, 120 S. Ct. 58 (1999), resulting in a remand for EPA to explain how it determined what risk was tolerable.[37] This is not an unreasonable demand when the statute requires the Agency to explain why "public health" will be advanced by its decision.[38] Without a legal standard ("intelligible principle") to guide its exercise of discretion, judicial review – including arbitrary and capricious review – simply is not possible.[39]

(1996) ("[T]he lawmaking function belongs to Congress, . . . and may not be conveyed to another branch or entity.").

[37] 134 F.3d at 392-93 ("[U]nless [the Administrator] describes *the standard under which she has arrived at this conclusion*, supported by a '[]plausible' explanation, . . . we have no basis for exercising our responsibility to determine whether her decision is 'arbitrary [or] capricious. . . .'" (emphasis added; citation omitted)).

[38] As the late Senator Chafee observed after the lower court's decision, "this is not a general defect in all of our environmental laws . . . . I agree with the Court as it expresses its discomfort with the vagueness in these two regulations." Statement of Hon. John H. Chafee, Chairman, Senate Environment Committee, Hearings on Clean Air Act (May 20, 1999).

[39] Contrary to EPA's argument, EPA Pet. 17-19, the lower court does *not* call for an unprecedented amount of precision in making NAAQS decisions. Rather, by requiring the Agency to enunciate an "intelligible principle" guiding its risk management decisions under § 109, the court is merely seeking consistency in decisionmaking, without which agency action would be arbitrary by definition.

Finally, EPA points in its petition to statutory language and legislative history which it believes could be used to derive intelligible principles for making risk management decisions under § 109. For example, EPA argues in its petition that an intelligible principle might be found, among other places, in (1) the Act's legislative history, which requires EPA to focus on health effects that are "medically significant," and not "merely detectable," EPA Pet. 15; and (2) the legislative history's direction to consider the "public health" and not "individual health." *Id.*[40]

While EPA's suggestions represent a good starting point for developing an intelligible principle for risk management, they are only a starting point. None of the language EPA identifies itself specifies how to select among a range of uncertain health risks, or among air quality levels that cannot be distinguished from a public health protection standpoint. Rather, this is the task the lower court has directed EPA to undertake on remand, and EPA's petition suggests that the Agency knows what this task entails.

For these reasons, the "nondelegation" question presented in the petitions for certiorari reveals no conflict with any prior precedent of this Court and no important issue of law. Certiorari on this question is not appropriate.

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[40] In its petition for rehearing to the lower court, EPA also argued that an intelligible principle might be found in the "requisite to protect" language of § 109 – namely, that this language requires a standard level no more or less stringent than "necessary" to protect public health. In its petition, EPA also advances for the first time use of a "zone of reasonableness" test. *See* EPA Pet. 18.

B. If Certiorari Is Granted, It Should Be Granted to Address the Scope of EPA's Authority on Remand To Define an Intelligible Principle.

For the reasons set out above, CAA Industry Respondents submit that the nondelegation issue raised by the Government does not offer a compelling reason for certiorari. Should this Court nevertheless grant certiorari on the need for an intelligible principle to guide § 109 risk management decisions, the Court will have to consider the scope of EPA's discretion to derive an intelligible principle from the CAA.

On this issue, the lower court was presented with arguments that neither the "margin of safety" standard-setting language of § 109 nor the "as may be appropriate" standard-revision language of § 109(d) prevents EPA from considering social or economic values or the indirect public health consequences of its decisions on NAAQS. The court of appeals emphatically rejected these arguments under "*Chevron* step one," on the ground that its prior decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), held that the "'[s]tatute . . . make[s] clear that economic considerations play no part in the promulgation of [NAAQS].'" EPA App. 19a.

However, this characterization of *Lead Industries* is at odds with the lower court's later decision interpreting similar language in CAA § 112, as it then existed, requiring regulation of hazardous air pollutants to provide an "ample margin of safety." *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (*en banc*). Although this language is more precautionary than the "adequate margin of safety" in CAA § 109, writing for the court, Judge Bork observed that the "margin of safety" language on its face "does *not* . . . preclude consideration of any factor," *id.*

at 1155 (emphasis added), and that *Lead Industries* and prior D.C. Circuit case law addressing § 109 does not stand for the proposition that "cost and technological feasibility can *never* be considered under the Clean Air Act unless Congress expressly so provides." *Id.* at 1157 (emphasis added).

If the Court decides to grant certiorari in response to the Government's nondelegation issue, we believe that the Court will necessarily have to address the scope of EPA's authority on remand to define intelligible principles for risk management decisions. Nevertheless, "out of excess of caution,"[41] CAA Industry Cross-Petitioners are filing a Conditional Cross-Petition presenting this question directly. CAA Industry Cross-Petitioners believe that this question is worthy of review and therefore would not object to a grant of certiorari to address the question as framed in the Conditional Cross-Petition.

II. THE COURT OF APPEALS' "SUBPART 2" HOLDING DOES NOT WARRANT CERTIORARI.

The petitions for certiorari also address the court of appeals holding that any revised NAAQS for ozone may be enforced only in conformity with Subpart 2 of Part D of the CAA rather than (as EPA alleges) under Subpart 1 as well. EPA App. 81a. In support of its petition, EPA first asserts that certiorari is needed to address an argument that EPA briefed for the first time in its petition for rehearing to the panel, namely, that the lower court lacked jurisdiction to review EPA's decision on this point. EPA Pet. 19-25. Alternatively,

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[41] *See, e.g., Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U.S. 237, 239 (1935).

EPA repeats the merits arguments that were rejected by the panel in its initial decision and again on rehearing, and which did not garner a single vote for rehearing *en banc*. EPA Pet. 25-29. Neither argument has merit, and neither provides a basis for certiorari.

A. The Government's Belated Finality and Ripeness Arguments Present Neither A Conflict of Law Nor an Issue of Importance.

CAA Industry Respondents challenged EPA's final rule revising the ozone NAAQS on the ground that, because the congressional Subpart 2 program is based on the existing 1-hour NAAQS and because this program applies "by operation of law" under CAA Section 181(a), EPA App. 117a-119a, to "[e]ach area designated nonattainment for ozone" under CAA § 107(d), it was not "appropriate" to replace the 1-hour NAAQS with a new more stringent 8-hour NAAQS that addressed the same public health risks, and that could not be implemented or enforced under Subpart 2. *See* EPA App. 35a.[42]

The lower court rejected the argument that revision of the ozone NAAQS was not "appropriate" on this ground. The court nonetheless accepted Industry Respondents' underlying argument that implementing a more stringent ozone NAAQS would conflict with the Subpart 2 statutory program that Congress established as the exclusive program for

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[42] Members of CASAC in fact recommended against an approach that would require simultaneous application of different ozone standards in different areas of the country, because of the confusion and disruption this would cause. *See, e.g.*, Letter from James H. Price to Thomas O. Miller (April 24, 1995), Ozone JA 388.

implementing the ozone NAAQS: "[a]s the petitioners argue," Subpart 2 of the 1990 Amendments "preclude[s] the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a (emphasis added).

EPA argues in its petition for certiorari that the "only issue before the court of appeals . . . was whether the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. 21. But this was clearly not the case, as State Petitioners recognize.[43] Indeed, the very first issue raised in CAA Industry Respondents' brief below was: "Whether EPA is authorized to substitute its policy judgment for that of Congress by replacing the statutory ozone reduction program designed specifically to implement the 1-hour NAAQS with a new program to implement a different NAAQS?" Furthermore, as the lower court's decision shows, CAA Industry Respondents specifically briefed and argued the issue of EPA's authority to implement a revised ozone NAAQS under Subpart 2 versus Subpart 1 of the Act. *See* EPA App. 40a.[44]

EPA then argues that it "did not take final action in the 1997 ozone rulemaking to implement or enforce the revised ozone NAAQS," and that actual implementation of the revised 8-hour NAAQS will be the subject of later proceedings establishing designations and classifications for the 8-hour NAAQS. EPA Pet. 20. But here again, EPA attacks a strawman. CAA Industry Respondents did not

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[43] State Pet. at 14 (Industry argued that "EPA could neither issue nor enforce a revised ozone standard."); *see id.* at 22.

[44] Indeed, the lower court had to address CAA Industry Respondents' arguments regarding the enforceability of the revised NAAQS in order to fashion relief. *See* EPA App. 57a, 81a.

challenge EPA's designation or classification of areas under the 8-hour NAAQS. *See* EPA Pet. 20. Rather, they challenged EPA's legal conclusion, embodied in 40 C.F.R. § 50.9(b) of the final rule, State App. 113, that EPA has authority to revoke the statutory Subpart 2 ozone reduction program in certain areas, and to replace it in those areas with a program to be developed under the general planning authority of Subpart 1 for a revised ozone NAAQS that is more stringent than the 1-hour ozone NAAQS.

That decision was final. As EPA explained in the preamble to the final ozone rule, that rule reflects EPA's legal conclusion that "the provisions of subpart 2 . . . will continue to apply as a matter of law for so long as an area is not attaining the 1-hour standard. . . . [T]he provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards."[45] EPA codified that final decision in § 50.9(b) of the final rule, State App. 113, which states that "[t]he 1-hour standards set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard."

On this important issue, therefore, EPA's decisionmaking process was completed with promulgation of the final rule.[46] Furthermore, important legal consequences flow from this final rule, because of the differences in deadlines and control programs that apply under the Subpart 1 and Subpart 2 programs.[47]

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[45] 62 Fed. Reg. 38,873, ICP App. 75a.

[46] *See id.* (noting that EPA's interpretation of the applicability of Subpart 2 was revised "in light of comments received on its proposed interpretation.").

[47] Thus, contrary to the Agency's assertions, *see* EPA Pet. 23-24, EPA's resolution of the applicability of Subpart 1 versus Subpart 2 to a revised

Indeed, in *EDF v. Browner*, D.C. Cir. No. 98-1363, EPA has asserted that the lower court lacks jurisdiction to hear EDF's challenge to EPA's revocation of the 1-hour NAAQS and Subpart 2 program in specific areas, because EPA's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was addressed and resolved in the ozone NAAQS rulemaking. EPA Br. in *EDF v. Browner* 27-28, ICP App. 85a-86a. According to EPA, "[o]ther participants in the [ozone] NAAQS rulemaking understood the implications of EPA's interpretation and challenged aspects of it in the pending *ATA* litigation." ICP App. 86a.

Under CAA § 307(b), ICP App. 63a-64a, any challenge to a final legislative rule under the Act must be filed within 60 days of the rule's publication in the *Federal Register*. Because EPA resolved the interplay of Subpart 2 and EPA's NAAQS revision authority in the revised ozone rule and EPA's resolution of this issue is reflected in specific regulatory language (*i.e.*, § 50.9(b)), CAA Industry Respondents' only opportunity to challenge EPA's resolution of this issue was in this case.[48] For these reasons, EPA's belated attempt to manufacture a finality or ripeness argument provides no basis for certiorari.

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ozone NAAQS plainly meets the conditions for finality set forth in *Bennett v. Spear*, 520 U.S. 154 (1997), and other cases cited in its petition.

[48] EPA's reliance on cases not addressing final agency regulations, promulgated after notice and comment rulemaking and expressly made subject to pre-enforcement judicial review, is misplaced. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998); *Dow Chemical v. United States Environmental Protection Agency*, 823 F.2d 319, 324-25 (5th Cir. 1987) (distinguishing final rules, developed after notice and comment rulemaking, that "fix[] a legal relationship.").

B. EPA's Arguments on the Merits, Which Have Been Rejected by the Panel and by the Court of Appeals *En Banc*, Provide No Basis for Certiorari.

The other arguments in EPA's petition for rehearing have been considered and repeatedly rejected by the lower court. While EPA asserts that the court misunderstood the CAA, EPA Pet. 25, certiorari is not a forum simply to re-argue matters resolved by the court of appeals. The circuit court's resolution of the interplay between Subpart 1 and Subpart 2 in implementing a revised NAAQS does not conflict with the decision of any other court and does not present a question of federal law that warrants the attention of this Court. *See* Sup. Ct. R. 10.

In support of its petition, EPA argues once again that "the CAA does not precisely address "how to reconcile Subpart 1 . . . . with Subpart 2." EPA Pet. 27. This is simply not the case, as the lower court carefully explained.

First, the court observed that CAA § 181(a) on its face provides that "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under Table 1, by operation of law." EPA App. 38a. This language establishes that Subpart 2 applies to "all areas designated nonattainment under any ozone NAAQS." *Id.* As the court explained, because "Congress has spoken on the 'precise question at issue,'" the court must give effect to the language of the Act under the first prong of *Chevron*. *Id.*[49]

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[49] The court also reviewed the language of § 172(a)(1)(C) and (a)(2)(D), which specifically provides that the attainment date and classification provisions of Subpart 1 "do not apply to nonattainment areas for which

Second, the lower court addressed related CAA provisions, the structure of the Act, and its legislative history, and it found them all consistent with the plain language of § 181. For example, the panel rejected EPA's argument that the reference to "section 7407(d)" in § 181(a) should be read as "section 7407(d)(4)" in order to limit the application of Subpart 2 to areas that were designated nonattainment in 1990.[50] As the court observed, this is not the language of the statute, and the legislative history shows that Congress acted purposefully when it referenced "section 7407(d)" to make Subpart 2 applicable to *all* current and future ozone nonattainment areas. EPA App. 38a - 39a. As a result, the Subpart 2 program applies to one-hour *attainment* as well as one-hour nonattainment areas, *including [one-hour] attainment areas that are redesignated to nonattainment in the future.*[51]

Regarding the overall structure of the CAA nonattainment program, the court observed that "Congress enacted Subpart 2 because of the failure of the controls in Subpart 1 to bring

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classification and attainment dates are specifically provided under other provisions of this part," as they are for ozone in Subpart 2. EPA App. 35a. While ALA now argues that the general planning requirements of Subpart 1 in § 172(b) and (c) do not contain similar "ouster" provisions, ALA Pet. 26, the simple response is that "ouster" language is not needed in these later subsections of § 172 once areas are "ousted" from the deadline and classification provisions that trigger the planning requirements.

[50] *See also* EPA Pet. 28 n.16. (Subpart 2 should be read to apply "only for nonattainment areas designated under Section 107(d) for the then-current one-hour ozone standard," based on § 107(d)(1) and (4)).

[51] CAA § 181(b)(1), EPA App. 119a (providing deadlines for attainment that are "extended by operation of law" for areas that are "subsequently redesignated to nonattainment for ozone.")

areas into attainment." EPA App. 39a. In order to resolve this problem, Congress in Subpart 2 decided not to "continue [to treat] all ozone nonattainment areas alike," but to provide different attainment deadlines and different control strategies for different areas depending on the ambient levels of ozone in an area in excess of the one-hour NAAQS. EPA App. 40a.

For example, Congress in Subpart 2 made clear that areas with intractable ozone problems (e.g., Los Angeles and Houston) would have to apply specific and aggressive control programs, but would not be subject to near-term, inflexible deadlines that could threaten economic shutdown. *See* EPA App. 41a. The court found that while EPA might have authority to revise the ozone NAAQS, EPA did *not* have authority to ignore the balance struck by Congress in Subpart 2 in favor of an alternative ozone reduction program under Subpart 1 that could require even more drastic measures.

As the court explained, under "EPA's interpretation . . . [the Subpart 2 statutory] scheme would have been stillborn had the EPA revised the ozone NAAQS immediately after Congress enacted the 1990 amendments." EPA App. 42a. EPA's assertion of authority to revoke the statutory Subpart 2 program "does not square with . . . the long-term nature of the attainment scheme enacted in Subpart 2," *id.*, and "clearly runs counter to the *comprehensive* enforcement scheme" based upon the one-hour NAAQS that Congress enacted in Subpart 2. EPA App. 41a (emphasis added).

The court also reviewed the legislative history, which shows that "Congress responded to the continued ozone problem [in 1990] by enacting a new enforcement scheme, which it codified as Subpart 2." EPA App. 32a. In other words, while Subpart 1 provides general planning requirements, Subpart 2 provides specific and detailed ozone-requirements for nonattainment areas, for attainment areas in

the ozone transport region, for "maintenance plans" in attainment areas, and for "attainment" areas that subsequently became "nonattainment" areas.[52] The legislative history confirms that Subpart 2 is "the Congress's comprehensive plan for reducing ozone levels *throughout* the country." EPA App. 33a (emphasis added).

In response to EPA's petition for rehearing below, the court clarified and confirmed its holding that "EPA can enforce a revised primary ozone NAAQS *only* in conformity with Subpart 2." EPA App. 81a (emphasis added).[53] The court also emphasized that its remand order was "without prejudice to the ability of any party to apply for vacatur" should EPA attempt to implement the revised standard. *Id.* As a result, the decision on rehearing confirms that, as the court held, the 1990 Amendments to the Act "must preclude the EPA from requiring areas to comply either more quickly *or with a more stringent ozone NAAQS*." EPA App. 40a. (emphasis added).

Finally, EPA argues that the lower court's decision will disrupt EPA's plans regarding ozone reductions.[54] But it is EPA's rule that has disrupted the carefully crafted *congressional* program for ozone reductions, and the court of appeals simply restored that program – a program that has produced and is continuing to produce substantial reductions in ozone. EPA's continued disagreement with this decision

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[52] *See* CAA §§ 182-185A, ICP App. 8a-62a; *see also* H.R. Rep. No. 101-490, Pt. 1, at 145-148, 229-258, *reprinted in* 2 1990 Legis. Hist. 3169 - 3172, 3253-3282.

[53] The State Petitioners correctly observe that Judge Tatel's concurring statement "is hard to reconcile . . . with the panel's opinion" regarding the non-enforceability of the revised ozone NAAQS. *See* State Pet. 22 n.8.

[54] *See* EPA Pet. 11; *see also* State Pet. 17, 28.

presents no conflict of law or important issue that merits certiorari.

C. The Interlocutory Nature of the Lower Court's Decision Counsels Against Granting Certiorari on the Subpart 2 Questions Presented by EPA.

The court of appeals remanded the revised ozone NAAQS to EPA because the Agency refused, as a statutory matter, to consider the increased public health risks (due to increased UVB radiation exposure) its revised standard would create. *See* EPA App. 47a - 48a. As a result, regardless of what this Court does here, EPA will have to undertake further rulemaking on the ozone standard to determine whether *any* standard revision is "appropriate" under § 109(d) in light of (1) the increased cancer and mortality risks associated with a more restrictive standard that increases UVB radiation exposure,[55] and (2) the conclusion of its independent science advisers that *none* of the alternative air quality levels under consideration can be distinguished as significantly more protective of public health.[56]

Because there will be additional rulemaking addressing the appropriateness of standard revision regardless of any action

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[55] Ozone reductions of the magnitude associated with EPA's revised standard could result in 2,000-11,000 additional cases of melanoma skin cancer per year, 25-50 melanoma related deaths per year, and up to 28,000 new cataract cases per year due to increased ultraviolet-B radiation exposure. R. Lutter and C. Wolz, "UV-B Screening by Tropospheric Ozone: Implications for the National Ambient Air Quality Standard," 31 *Env'tl. Sci. & Tech. News* 142-46 (1997), Ozone JA 2759.

[56] Letter from Dr. George T. Wolff, Chair, CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 236.

by this Court, certiorari is unnecessary on the Subpart 2 issues.

CONCLUSION

For the foregoing reasons, if certiorari on the "nondelegation" issue is granted, it should embrace the issue presented by CAA Industry Cross-Petitioners in their Conditional Cross-Petition for Certiorari. Otherwise, certiorari should be denied on the questions presented by the Government and other petitioners.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioner,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

MASSACHUSETTS AND NEW JERSEY,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected the Environmental Protection Agency's ("EPA's") standardless interpretation of Sections 108 and 109 of the Clean Air Act ("the Act"), and remanded under *Chevron* for EPA to fashion and apply a proper interpretation of the Act.

2. Whether the court of appeals acted within its jurisdiction in reviewing, as a final agency action ripe for review, EPA's ruling that it can implement a revised National Ambient Air Quality Standard ("NAAQS") for ozone pursuant to its general implementation authority under Section 172 of the Act, notwithstanding Congress' enactment of a specific implementation schedule for the ozone NAAQS in Section 181 of the Act.

3. Whether the court of appeals correctly held that the specific classifications and attainment dates set forth in Section 181 of the Act for the ozone NAAQS take precedence over EPA's general authority to devise classifications and attainment dates for the various NAAQS pursuant to Section 172 of the Act.

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INTRODUCTION

A properly reformulated version of the Government's first question is worthy of this Court's review for the reasons summarized in Part I below and detailed in the conditional cross-petition filed today by the American Trucking Associations, Inc., the Chamber of Commerce of the United States, and other "Small Business Petitioners" below (collectively "ATA"). The court of appeals invalidated the Environmental Protection Agency's ("EPA's" or "the Agency's") interpretation of its standard-setting authority under the Clean Air Act ("CAA" or "the Act"), using the framework provided by this Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). While the constitutionality of the underlying statutory provisions was never at issue, the court deployed the nondelegation and constitutional avoidance doctrines to invalidate EPA's statutory interpretation and to remand under *Chevron*. The court of appeals' interpretation was constrained by *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) ("*Lead Industries*"), a decision never reviewed by this Court. ATA acquiesces in *certiorari* on a question properly framed to include all of the interrelated issues involving the interpretation of EPA's standard-setting authority, recognizing that the constitutional issues discussed below might be avoided entirely if *Lead Industries* were held to be wrongly decided.

The second and third questions presented by the Government (as well as the similar questions presented by the American Lung Association and State petitioners), concern entirely separate provisions of the Act, and are patently unworthy of *certiorari*. They involve Subpart 2 of the Act's Title I, Part D, which codifies a detailed schedule for gradual attainment of the National Ambient Air Quality Standard ("NAAQS") for ozone. At issue is EPA's decision to supplant Subpart 2 by requiring the States to attain a revised ozone NAAQS on an accelerated schedule that overrides the Subpart 2 schedule. The Agency's justification? That the *specific* classifications and attainment dates set forth in Subpart 2 do not "restrict EPA's *general*

authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

The court of appeals unanimously rejected EPA's argument and not a single judge voted to rehear the case on this issue. The Government's attempt to dress up its Subpart 2 point by belatedly raising finality and ripeness arguments was also unanimously rejected by all three panel members, and drew no interest from the *en banc* court. As explained in Part II below, the second and third questions do not warrant *certiorari* for at least three separate reasons.

First, the court of appeals' ruling on Subpart 2, unlike its ruling on the main issue presented, is interlocutory. That is because the court of appeals unanimously reversed EPA's ozone NAAQS on other grounds. Specifically, EPA argued that it was barred by statute from considering record evidence from officials of three separate federal agencies that reducing ground-level ozone by the amounts predicted for EPA's ozone NAAQS could lead to thousands of additional skin cancer and cataract cases every year. The unanimous court of appeals made quick work of that argument, both in its initial decision and in denying rehearing.

The Government does not seek *certiorari* on this issue and indeed never even mentions that it must redo its ozone NAAQS *independently* of the issues on which *certiorari* is being sought. But that remarkable omission cannot disguise the fact that the substantial new proceedings now required will take years to complete. Specifically, the Agency must commence a new rulemaking that will require, *inter alia*: (1) a revised scientific review document; (2) additional review by the Clean Air Scientific Advisory Committee ("CASAC"); and (3) a new proposal and final rule that address the evidence, cited by the court of appeals, that lowering the ozone NAAQS may have a *negative* net health effect. Every aspect of the Subpart 2 issue is on hold until these proceedings are completed. Only then would any remaining questions about the implementation schedule for a newly revised ozone NAAQS have to be revisited

by the court of appeals and, if necessary, this Court. *See* Part II-A below.

Second, the Government's merits argument concerning Subpart 2 is entirely unconvincing, as the unanimous court of appeals decision demonstrates. It is a "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Tellingly, not one member of the D.C. Circuit accepted EPA's contention that the scheme for implementing *NAAQS in general* trumped the specific provisions of Subpart 2 governing implementation of the *ozone NAAQS* in particular. *See* Part II-B below.

Finally, there is simply no basis for the Government's argument that the court of appeals lacked jurisdiction to reach the Subpart 2 issue. EPA never argued that the Subpart 2 ruling which *it* had made in the rulemaking below was not final until *after* the panel unanimously ruled against the Agency. Even EPA's rehearing petition devoted only about one page to arguing finality and ripeness – arguments that were unanimously rejected. Even now, the Government relies only on easily distinguishable cases that hold only that agency rulings sometimes are not final where (unlike here) they were *not* subject to formal notice and comment rulemakings, were *not* published in the Federal Register, and were *not* expressly made subject to prompt judicial review by statute. None of these cases presents a circuit conflict with the decision below, nor can the Government plausibly argue that the panel's application of settled finality and ripeness principles conflicts with any decisions of this Court. *See* Part II-C below.

COUNTERSTATEMENT OF THE CASE

A. The Clean Air Act

Section 109 of the Act authorizes EPA to establish primary and secondary NAAQS for certain pollutants and to reconsider and, if necessary, amend those standards every five years. CAA § 109(a), 42 U.S.C. § 7409(a). In general, NAAQS enactment

and enforcement entails three steps: promulgation, designation/classification, and then implementation through State Implementation Plans ("SIPs"). Primary NAAQS are promulgated at levels "requisite to protect the public health" with "an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). Secondary NAAQS are to be set at levels "requisite to protect the public welfare." CAA § 109(b)(2), 42 U.S.C. § 7409(b)(2).

Following the promulgation of a NAAQS, EPA must designate each air quality area as an attainment, nonattainment, or unclassifiable area. *See* CAA § 107(d), 42 U.S.C. § 7407(d). The Agency then classifies each such area based on "factors such as the severity of nonattainment in such area," and assigns an attainment date based on that classification. *See* CAA § 172(a)(1), (2), 42 U.S.C. § 7502(a)(1), (2) ("Subpart 1").

As part of its 1990 amendments to the Act, Congress provided a "comprehensive plan for reducing ozone levels throughout the country." App. 33a. Each area is assigned a statutory classification based on the extent of its noncompliance with the existing ozone NAAQS, as well as a specific attainment date based on that classification. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) ("Subpart 2"). Congress enacted this regime to "strip[] the EPA of discretion to decide which ozone nonattainment areas should receive more time to reach attainment . . . ." App. 40a.

B. The EPA Rulemakings

Following the 1990 amendments, EPA initiated two rulemakings in 1996 to revise the NAAQS for ozone and particulate matter.

1. The Ozone Rulemaking

EPA's Clean Air Scientific Advisory Committee ("CASAC") is an independent scientific review committee that EPA must consult regarding NAAQS revisions. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2). In the ozone rulemaking, CASAC advised

the Agency that "there is no 'bright line' which distinguishes any of the proposed standards . . . as being significantly more protective of public health." J.A. (Ozone) at 239. EPA nonetheless replaced the existing 0.12 ppm one-hour ozone NAAQS with a 0.08 ppm eight-hour standard based on a "policy" judgment that the latter standard is "sufficient[]" in light of "hazards that research has not yet identified" and "uncertainties associated with inconclusive scientific and technical information." 62 Fed. Reg. 38,856, 38,857, 38,863, 38,867 (July 18, 1997). In so doing, EPA asserted the right to render decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." *Id.* at 38,883 (emphasis added).

The Agency also ruled out any consideration of the health tradeoffs (for example, the prospect that reducing ground-level ozone could increase cancer levels) or the economic costs of its proposed rule. Commenters had submitted evidence that the health disbenefits of reducing ground-level ozone to the degree that EPA proposed could more than offset any benefits from increased respiratory protection. In particular, a study by the United States Department of Energy documented that, while the new ozone standard would cause some reduction in respiratory ailments, it would also increase the incidence of skin cancer, melanoma, and cataracts by permitting more ultraviolet radiation to reach ground level. J.A. (Ozone) at 255-71. A further study by Office of Management and Budget staff members concluded that the "adverse health effects of . . . EPA's more stringent [ozone] NAAQS may be similar in magnitude to the respiratory-related beneficial effects of such an [ozone] reduction," and a study by EPA personnel produced comparable results. *See id.* at 2764, 3089. Nonetheless, the Agency claimed that taking account of all health effects would be "inconsistent with the Clean Air Act and ill advised from an environmental management policy perspective." *Id.* at 210.

EPA also refused to consider the economic costs of its proposed standard on the ground that *Lead Industries* and subsequent D.C. Circuit decisions "interpreted section 109 of the Act as precluding consideration of the economic costs or feasibility of NAAQS in setting them." 62 Fed. Reg. at 38,878. The Agency acknowledged, however, that the costs of attaining the revised ozone NAAQS would greatly *exceed* the resulting benefits, perhaps by as much as six times. *See* J.A. (Ozone) at 2919, 2924, 2932-34 (costs could exceed $9 billion; benefits could be as low as $1.5 billion).

EPA also rejected the contention, made by many commenters, that it lacked authority to revise the ozone NAAQS. Those commenters relied on Subpart 2 of the 1990 amendments, which requires EPA to classify each nonattainment area into one of five specific categories, and does not provide a category for areas with ozone levels lower than 0.12 ppm (the level of the existing ozone NAAQS). EPA responded that because Subpart 2 "simply govern[s] the implementation of the [existing ozone] standard," the Agency is free to revise the ozone NAAQS and then ignore Subpart 2 altogether. *See* 62 Fed. Reg. at 38,885.

2. The PM Rulemaking

The PM rulemaking consisted of essentially two rulemakings: one rulemaking on fine PM ("$PM_{2.5}$"), and one rulemaking on coarse PM ("PM_{10}"). Since 1988, EPA had regulated all particles with diameters less than 10 micrometers under a single standard. *See* App. 49a. In the rulemaking below, however, EPA determined that "coarse and fine particles pose independent and distinct threats to public health," and that separate standards should be established. *See id.*

Although EPA concluded that the PM standards should be strengthened, CASAC expressed skepticism that this was necessary. In particular, nearly half of CASAC's members concluded that the PM standard should not be tightened at all, and many of the remaining panelists agreed that EPA's

proposed standard was too strict. *See* J.A. (PM) at 3151, 3165-66. These CASAC panelists explained that EPA had "overstated" the claimed health benefits of its proposal, in part because pollutants other than PM might be responsible for the effects that EPA attributed to PM. *See id.*

In response, EPA acknowledged the great "uncertainty in the characterization of health effects attributable to exposure to ambient PM." 62 Fed. Reg. 38,652, 38,655 (July 18, 1997). As it had in the ozone rulemaking, however, EPA asserted the right to promulgate the revised standard based on an *ad hoc* analysis that recognizes "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' or any other metric," and that is "largely judgmental in nature." *Id.* at 38,688.

EPA also acknowledged that compliance with its revised PM NAAQS would cost at least $37 billion annually, J.A. (PM) at 3477, making this the most expensive environmental program ever. By EPA's own estimate, the costs of even partial compliance would greatly *exceed* the total annual sales of small businesses in several sectors, and therefore drive such companies out of business altogether. *Id.* at 3611-12, 3628. As it had in the ozone rulemaking, however, EPA publicly stated that it would not consider these extraordinarily high costs. 62 Fed. Reg. at 38,683.

C. The Congressional Response

Congress responded by postponing the implementation of the revised ozone and PM standards, and thus providing time for pre-implementation judicial review. *See* Pub. L. No. 105-178, §§ 6101-03, 112 Stat. 107 (1998). In particular, Congress delayed implementation of the PM NAAQS until such a time as $PM_{2.5}$ monitors are put in place and three years' worth of data have been gathered. *See id.* § 6102. It also pushed back implementation of the ozone NAAQS by one year. *See id.* § 6103(a). Congress emphasized that "[n]othing" in its action

"shall be construed . . . to be a ratification of the ozone or [PM] standards." *Id.* § 6104.

D. The Court of Appeals Proceedings

1. Panel Proceedings

Before the court of appeals, EPA continued to assert that "nothing in the statute requires [the Administrator] to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." EPA Ozone Br. at 43 (emphasis added). The D.C. Circuit disagreed. In particular, the court held that Section 109 must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. *See* App. 5a. The court of appeals accordingly "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement," and, "if appropriate, modify the disputed NAAQS." *Id.* 4a, 5a. Judge Tatel dissented on this point. *See id.* at 59a.

The D.C. Circuit also unanimously remanded for entirely separate reasons. In the coarse particulate case, the court held that EPA erred in adopting an "arbitrary indicator for coarse particle pollution." *Id.* at 53a. As for ozone, the court rejected, both as contrary to the plain language of the Act and as unreasonable, EPA's "bizarre" contention "that a statute intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance." App. 47a.

Finally, while the court of appeals unanimously accepted EPA's contention that, notwithstanding the detailed provisions of Subpart 2, the Agency may still revise the ozone NAAQS, *see* App. 31a-43a, it unanimously rejected EPA's contention that "Subpart 2 specifically provides classifications and attainment dates only for nonattainment designations under the [existing] ozone NAAQS." *Id.* at 37a. The plain language and drafting history of Subpart 2 confirm that the subpart applies to all ozone NAAQS, including revised NAAQS. *See id.* at 38a-39a. Because Congress' detailed handiwork was "purposeful

and not the drafting error that EPA's interpretation implies," "EPA is precluded from enforcing a revised primary ozone NAAQS other than in accordance with . . . Subpart 2." *Id.* at 34a.

2. Rehearing Proceedings

In a petition for rehearing, EPA's lawyers argued that the Agency had followed a constitutional interpretation of the Act in the underlying rulemakings. The panel majority rejected that contention, and explained that "the agency previously put forward neither the assertedly intelligible principle its counsel now claim to find in the statute nor the corollaries its counsel now implicitly derive therefrom." App. 73a. Accordingly, the court "express[ed] no opinion" on these *post hoc* rationalizations. *See id.* at 74a. The panel majority went on to emphasize that, when read in light of its context and purpose, the Act *could* be interpreted to provide a constitutionally sufficient "intelligible principle." App. 75a. Because the Act is ambiguous as to what that principle is, however, the court held that the appropriate remedy is a remand to the agency for development of a constitutional construction. *Id.* at 76a (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984)).

EPA's rehearing petition also argued, for the first time, that the panel lacked jurisdiction to reach the Subpart 2 issue because the Agency "has taken no final action implementing the revised NAAQS." App. 77a. All three judges rejected that contention. *Id.* at 79a. The court explained that "[w]hether agency action is final for purposes of [judicial review] entails a functional, not a formal, inquiry." *Id.* at 77a. Here, EPA had expressed its definitive position on the implementation issue, which is "a pure question of law, the resolution of which would not benefit from a more concrete setting." *Id.* at 77a-79a. In addition, EPA's promulgation of the revised NAAQS "triggered" certain statutory provisions that "impose a number of requirements upon the states." *Id.* at 78a.

On the merits, EPA continued to press its contention that Subpart 2 amounts to a massive scrivener's error. *See* App. 79a. All three members of the panel again rejected that contention, and noted that "all five Subparts of the Clean Air Act providing requirements for nonattainment areas" contain the same language. *See id.* The *en banc* court unanimously denied rehearing on the Subpart 2 issue.

Two opinions dissenting from the denial of rehearing *en banc* addressed the main statutory interpretation questions. *See* App. 92a. Judge Silberman's dissent disagreed with the panel majority's use of the nondelegation doctrine. But he went on to emphasize that he was "quite uncertain" whether EPA's analysis satisfied the demands of "arbitrary and capricious" review. *See id.* at 96a. Judge Tatel also dissented from denial of rehearing and focused on use of the non-delegation canon. His opinion was joined by Chief Judge Edwards and Judge Garland. *See id.* at 97a.

REASONS FOR GRANTING THE PETITION IN PART AND DENYING THE PETITION IN PART

I. THE COURT SHOULD GRANT *CERTIORARI* BOTH ON THE GOVERNMENT'S FIRST QUESTION AS REFORMULATED TO REFLECT THE COURT OF APPEALS' ACTUAL HOLDING AND ON ATA'S CONDITIONAL CROSS-PETITION.

ATA submits that the court of appeals was certainly correct when it invalidated EPA's standardless interpretation of Sections 108 and 109, but also that the proper interpretation of these provisions is so exceptionally important that *certiorari* is warranted on that issue. In rejecting EPA's interpretation under *Chevron*, the panel majority faithfully followed this Court's precedents holding that constitutional avoidance and nondelegation principles retain vitality as construction canons. While the court was right to condemn EPA's assertion of unbridled and *ad hoc* policymaking authority, ATA submits that all sides would benefit from this Court's authoritative

construction of the Act for the reasons set forth in ATA's conditional cross-petition.

A. The Court of Appeals Correctly Employed Constitutional Avoidance and Nondelegation Principles to Invalidate EPA's Standardless Statutory Interpretation.

The Government bases its unusually strong condemnation of the court of appeals' decision on a red herring. The court of appeals did not hold Section 109 unconstitutional, much less mark out a "radical departure from settled law." Pet. 9. Instead, the D.C. Circuit merely (1) applied the traditional rule that agencies must construe their authorizing statutes to provide some "intelligible principle" to confine agency discretion and guide judicial review; and, finding that EPA failed to follow such an interpretation, (2) "remand[ed] the cases for EPA to develop a construction of the act that satisfies this constitutional requirement." App. 4a, 5a.

It is therefore common ground that "'in our increasingly complex society . . ., Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" Pet. 16 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). There is also no dispute that while "the doctrine of unconstitutional delegation is . . . a fundamental element of our constitutional system," it is not "readily enforceable by the courts" in the manner of other constitutional guarantees. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

Confronted by these exigencies, the Court has responded, not by abandoning this "fundamental element" of the Constitution, but by transforming the nondelegation doctrine into a canon of construction. In particular, this Court has consistently held that Congress may delegate policymaking discretion to agencies *if* it provides an "intelligible principle" to guide the exercise of that discretion. *See, e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Mistretta*, 488 U.S. at 372; *FEA v. Algonquin SNG*, 426 U.S. 548, 559 (1976). And, consistent with the

doctrine of constitutional avoidance, this Court has wielded this rule to construe statutes narrowly in order to supply the requisite "intelligible principle." *See, e.g., Industrial Union Dep't AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (plurality opinion) ("*Benzene*"); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974). Accordingly, while consistently rejecting claims that statutes should be *struck down* under the non-delegation doctrine, this Court has never waivered in "*giving narrow constructions* to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 374 n.7 (emphasis added).

The court of appeals' deployment of these well-established construction canons hardly constitutes a "striking departure from this Court's nondelegation jurisprudence." Pet. 11. Rather, the "striking" fact about this case is that an agency of the federal government would assert and then defend up to the Supreme Court a supposed right to allocate tens of billions of dollars of public and private resources through decisions that follow "no generalized paradigm," that "may not be amenable to quantification in terms of what risk is 'acceptable' *or any other metric*," and that are "largely judgmental in nature." 62 Fed. Reg. at 38,688 (emphasis added).

Nor is there truth in the various other hyperbolic accusations hurled by the Government. Far from "overlooking this Court's instruction that the starting point for analysis of a nondelegation claim should be the statute's language, purpose, history, and context," *see* Pet. 12 (citing *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)), the court of appeals expressly complied with that instruction, instructed the Agency to follow it, and quoted *American Power & Light* for that very proposition. *See* App. 75a. Nor did the court "expressly reject[] EPA's view that the relevant provisions of the CAA . . . set out intelligible principles." Pet. 7-8 (mischievously citing the *entirety* of the rehearing opinion below). Instead, the court proposed such a principle itself, noted that EPA "may well find

a completely different method for securing reasonable coherence" on remand, and went out of its way to "express no opinion" on the sufficiency of a principle proposed for the first time by EPA's appellate counsel on rehearing. *See* App. 18a, 74a. And finally, far from holding that "the nondelegation doctrine requires . . . a quantitative rule for deciding the precise degree of protection required for a given health or safety standard," Pet. 17; *see also id.* (court requires "exactly the 'right' result"), the panel made clear that EPA would retain authority to exercise "'policy judgment,'" and noted that it had previously upheld on nondelegation grounds an agency interpretation that allowed standards to be set "somewhere between" a given level and "some 'moderate' departure from that level." *See* App. 12a-13a.

As the court of appeals patiently explained, constitutional issues are lurking in this case only because the Agency's "construction" of its governing statute amounts to no construction at all. Specifically, the interpretation fails to "speak to" the critical question presented by the statute – the "issue of degree"– and thus leaves the agency "free to pick any point" it chooses. *See* App. 5a, 7a, 13a. Moreover, the inherent vice of EPA's interpretation is further worsened by the context in which it was issued – promulgation of the most expensive environmental program ever. In view of "the unprecedented power over American Industry that would result from the Government's view," a construction that "avoids this kind of open-ended grant should certainly be favored." *See Benzene*, 448 U.S. at 645, 646 (plurality opinion).

In the end, the Government is left with the surprising accusation that, by remanding to EPA so that the Agency itself can adopt a more constrained view of its authority, the court of appeals undertook a "fundamental change in the nature of judicial review of agency standard-setting" that would "expand the role of courts" and lead to "otherwise unwarranted judicial supervision in the exercise of administrative discretion." *See* Pet. 9, 16-17.

Once again, this is mere hyperbole. On its own terms, the court of appeals simply made the inevitable reconciliation between use of the modern nondelegation doctrine as a tool of interpretation, on the one hand, and the deference accorded under *Chevron* to agencies' interpretations of their governing statutes, on the other. As the court of appeals explained, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority." App. 76a (citing *Chevron*). In this regard, the remedy selected below is functionally indistinguishable from the work-a-day remands courts issue every time they invalidate an unreasonable agency interpretation under *Chevron*. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999); *City of Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191 (D.C. Cir. 1991).

B. This Court Should Grant *Certiorari* on a Properly-Formulated Question That Encompasses the Statutory Interpretation Issues Covered in ATA's Conditional Cross-Petition.

The Government now concedes that EPA must develop a new interpretation of Sections 108 and 109 – at least to the extent necessary for it to consider the health "disbenefits" of lowering ground-level ozone levels. ATA agrees that EPA would benefit from this Court's plenary construction of these same sections, including whether the court of appeals was correct that EPA must ignore all factors "other than 'health effects relating to pollutants in the air'" in setting NAAQS. App. 15a; *see* ATA Cross-Petition. Review by the Court at this stage would increase the likelihood that EPA's next NAAQS rulemaking will be more successful than its last. *Cf.* Pet. 19 ("This Court should grant review . . . before EPA and other agencies refocus the[ir] analyses").

As drafted by the Government, however, the first question contains two significant flaws. *First*, it is somewhat misleading,

as it emphasizes the issue of whether Section 109 is unconstitutional (which it undisputedly is not), and downplays the real issue in this case: whether EPA used a standardless *interpretation* when issuing its ozone and PM NAAQS. Accordingly, the question presented should be reformulated to reflect accurately the holding of the court of appeals, and thus the issue before this Court, to wit: whether the court of appeals correctly rejected EPA's standardless interpretation, and remanded under *Chevron* for the Agency to fashion and apply a proper interpretation.

Second, the Government's question fails expressly to mention the court of appeals' interrelated and imbedded ruling that EPA may not consider "any factor other than 'health effects relating to pollutants in the air'" in setting a NAAQS. App. 15a. The court below recognized that this ruling would constrain the Agency's ability to develop an "intelligible principle" on remand, but felt it was precluded by circuit precedent from ruling otherwise. *See id.* at 18a. In order to ensure that *this Court* is not encumbered by arguments contending that it is jurisdictionally barred from issuing a comprehensive interpretation of the relevant provisions, and also to ensure that EPA receives the full and final guidance that it has requested, the Court should grant, or at least hold in abeyance, ATA's conditional cross-petition.

II. THIS COURT SHOULD DENY *CERTIORARI* ON THE SUBPART 2 QUESTIONS PRESENTED.

If it had properly formulated and presented its first question alone, EPA would have brought before the Court what is likely the most significant administrative law case since the 1980s trilogy of *Benzene*, *Chevron*, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). But instead, EPA has sought to piggy back onto that single *cert*-worthy question, two additional questions that do not deserve the Court's attention. Those two additional questions, both entirely unrelated to the main question presented, are (1) whether the court of appeals erred in

unanimously concluding that EPA's rulings on the Act's Subpart 2 are final and ripe for review; and (2) whether the court erred in unanimously rejecting EPA's contention that Subpart 2 could be effectively nullified. Taking those two unworthy questions would needlessly complicate what already promises to be an unusually complex case with numerous parties and the intersection of statutory construction, constitutional, and administrative law issues. As demonstrated below, neither question is remotely worthy of *certiorari*.

A. This Court Should Deny *Certiorari* on Both Subpart 2 Questions, Because, Unlike the Main Issue, Those Questions Are in an Interlocutory Posture.

Resolution of the second and third questions presented by EPA would have no practical effect at this time. Those issues address the question whether EPA may *implement* and *enforce* a revised ozone NAAQS outside of the framework provided by Subpart 2. They do *not* address – indeed they are entirely separate from – the question of the statutory standards and record that gover EPA's *promulgation* of a revised ozone NAAQS. Accordingly, any ruling by this Court on the second and third questions presented would not take effect until EPA promulgates a revised ozone NAAQS on remand – a point that EPA itself has underscored by suspending its implementation activities following the D.C. Circuit's invalidation of the revised ozone NAAQS. *See* 64 Fed. Reg. 57,424, 57,425 (Oct. 25, 1999).

How far off is a conclusion to any ozone remand proceedings and the first practical effects of the appellate court's Subpart 2 decision? *First*, EPA must revise its Section 108 criteria document for ozone, which will entail scientific review of not only ozone's heretofore ignored "positive effects," but also of the rest of "the latest scientific knowledge" relevant to ozone's effects on human health and welfare. CAA § 108(a)(2), 42 U.S.C. § 7408(a)(2). *Second*, CASAC must review that revised criteria document. CAA § 109(d)(2)(B), 42 U.S.C.

§ 7409(d)(2)(B). *Third*, EPA must draft a revised ozone NAAQS based in part on the revised criteria document and CASAC's review. *See* CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). *Fourth*, EPA must provide CASAC sufficient time to review its new proposal. *See* CAA § 109(d)(2), 42 U.S.C. § 7409(d)(2)(B). *Fifth*, EPA must issue a notice of proposed rulemaking that explains any differences between its proposed rule and CASAC's recommendations. *See* CAA § 307(d)(3), 42 U.S.C. § 7607(d)(3). *Sixth*, EPA must permit time for meaningful comment, and respond to all significant comments. *See* CAA §§ 307(d)(5), (6)(B), 42 U.S.C. §§ 7607(d)(5), (6)(B).

All by itself, the three to five years that likely will be required to complete these steps is sufficient to warrant denial of *certiorari* on both Subpart 2 questions. "[E]xcept in extraordinary cases, the writ [of *certiorari*] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Ironically, EPA's petition only underscores this dispositive point. By principally contending that the D.C. Circuit erred on finality/ripeness grounds, EPA would place the proper time for review even farther out into the future.

To be sure, EPA must hope that its unworthy Subpart 2 issues can be smuggled into this Court under cover of the entirely separate first question presented. But the logic of ATA's acquiescence to *certiorari* on the main issue does not carry over to the Subpart 2 issues. On the main question, there is substantial disagreement within the D.C. Circuit, the nation's busiest administrative law court, concerning the interrelated statutory construction, constitutional, and administrative law issues presented here. Even if presented in an interlocutory posture (which it is not), *that* question – as opposed to unanimous rulings on non-recurring issues – is the type of question on which the Court might properly grant *certiorari*. *Cf.* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE § 4.18 at 196 (7th ed. 1993) (interlocutory *certiorari* may be granted

"where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case").

But more importantly, the main question, unlike the Subpart 2 questions, is *not* in an interlocutory posture. EPA's regulations for fine particulate matter – the costliest part of the combined rulemakings with a minimum price tag of *$37 billion per year* – were invalidated based *only* on the court's rejection of EPA's standardless interpretation of the Act. If that invalidation is overturned, the fine PM rules would spring immediately back to life. By contrast, the Subpart 2 implementation issues are of no practical moment until EPA has completed the lengthy, multi-year remand proceedings independently required for ozone. Accordingly, even if the Subpart 2 issues otherwise warranted review (which they do not, *see* Sections B and C below), both the court of appeals and this Court will have ample time to provide that review years hence, once a valid ozone NAAQS has been promulgated. Until then, *certiorari* should be denied.

B. The Subpart 2 Merits Question Does Not Warrant *Certiorari*.

Under the traditional test for *certiorari*, the Subpart 2 merits issue may be one of the most unlikely candidates for review that this Court ever encounters in a government petition. Put aside the absence of dissents on this issue below, at either the panel or the *en banc* stage. The truth remains that the court's Subpart 2 ruling affects the interpretation of only one statute, can never give rise to a split among the circuits, and will not have any practical effect for years to come. As demonstrated below, those facts, coupled with an ever-changing EPA position on the issue and a decision below that is unassailable on its merits, make this issue a most unlikely candidate for *certiorari*.

1. The Subpart 2 Merits Question Fails to Satisfy the Criteria for Certiorari. The Subpart 2 issue involves "EPA's authority to implement and enforce [a] revised ozone NAAQS." Pet. 19-20. But the essential precondition to implementing or

enforcing a "revised" ozone NAAQS is, of course, the valid *promulgation* of a revised ozone NAAQS. Until that occurs, questions of enforcement and implementation cannot possibly arise.

In the meantime, there is no chance that the D.C. Circuit's decision will have ripple effects. Only the D.C. Circuit reviews NAAQS revisions, CAA § 307(b), 42 U.S.C. § 7607(b), so there is no potential for an inconsistency to develop among the circuits. Nor did the D.C. Circuit misstate or improperly invoke the rule of *Chevron*, the governing legal principle here. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *cf. Ross v. Moffitt*, 417 U.S. 600, 617 (1974) ("perceived correctness" is not a primary factor in granting *certiorari*); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Supreme Court does not sit as court of error).

For their part, the state petitioners claim that review is needed to dispel the "enormous uncertainty for the states as regulators." *See* Pet. of Mass. and N.J. 29. But any "uncertainty" that might once have existed has now been dispelled by the passage of the deadline for challenging the ruling invalidating the ozone NAAQS for EPA's failure to consider health "disbenefits." All States now know or should know that the 0.12 ppm one-hour ozone NAAQS, implemented and enforced via the congressionally-enacted regime of the Act's Subpart 2, is the only enforceable ozone NAAQS for the foreseeable future. True enough, there may be time lags involved as EPA reshapes its regulations to conform to this legal reality. *See id.* at 26-27 (describing such problems). But that is always the case when agency actions are reversed and new proceedings must be commenced.

Moreover, notwithstanding its claim to deference, *see* Pet. 25, 28-29, EPA now asserts that it has yet to complete its "full thinking" on this issue. *Id.* at 24; *see also id.* at 10 (Agency still needs time "to develop fully its interpretation").

This is an EPA assertion that rings true. Before the appellate panel, EPA argued that Congress had committed a particular scrivener's error. *See* App. 42a (EPA argues "section 107(d)" actually means "section 107(d)(4)"). Before the *en banc* court it argued for a different scrivener's error. *See id.* at 42a (EPA argues "section 107(d)" actually means "section 107(d)(1)(C) and section 107(d)(4)"). In this Court, EPA has now put claimed scrivening errors aside in favor of arguing about the statutory "context[s]." Pet. 28 n.16; *see* pp. 22, below. There should accordingly be an extraordinarily strong, conclusive presumption against review here, where EPA continues to change legal theories and the court of appeals has expressly left open the door to further proceedings once EPA promulgates a new rule (and identifies a coherent statutory interpretation) years out into the future. *See* App. 81a.

2. *The D.C. Circuit Correctly Decided the Subpart 2 Merits Question.* The Subpart 2 legal issue no doubt appears complex to the uninitiated. It involves EPA's authority to promulgate a revised ozone NAAQS, and then designate, classify, and set attainment dates for areas based on that revised NAAQS. In this Court, however, EPA seeks *certiorari* on a very narrow, easily-answered issue: whether the *specific* classifications and attainment dates set forth in Subpart 2 of the Act for the ozone NAAQS "restrict EPA's *general* authority under other provisions" to implement a revised ozone NAAQS. Pet. (I) (emphasis added).

EPA's question answers itself, for "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Moreover, EPA's theory, as the court of appeals unanimously recognized, would have rendered Subpart 2 "stillborn had the EPA revised the ozone NAAQS immediately after the Congress enacted the 1990 amendments," and then proceeded to implement the revised NAAQS outside of the Subpart 2 framework. App. 42a. As the court of appeals held,

EPA cannot so easily eviscerate the "comprehensive enforcement scheme enacted in Subpart 2." *Id.* at 41a.

EPA correctly acknowledges that this issue turns on "the interplay among Section 107(d), Section 172, Section 181, and other relevant provisions" of the Act. *See* Pet. 24. Section 107(d) requires that "upon promulgation or revision" of a NAAQS, "the Administrator shall promulgate the designation of all areas" as "attainment," "nonattainment," or "unclassifiable." CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A). As a general matter, Section 172 of Subpart 1 of the Act grants EPA authority to give classifications to those areas that it has designated as being in nonattainment, and to set attainment dates for those areas based on their classifications. *See* CAA § 172(a), 42 U.S.C. § 7502(a). By Section 172's own terms, however, that authority "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part," or "with respect to areas for which attainment dates are specifically provided under other provisions of this part." CAA §§ 172(a)(1)(C), (2)(D), 42 U.S.C. §§ 7502(a)(1)(C), (2)(D).

In the case of the ozone NAAQS, Section 181 of Subpart 2 provides that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) of this title [CAA § 107(d)] *shall* be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1 then provides classifications and attainment dates based on a region's design value (a measure of its ozone level). *See id.*

As the court of appeals explained, these provisions unambiguously refute EPA's contention that it can ignore Subpart 2 by "establish[ing] classifications and attainment dates and tak[ing] other implementing actions for the revised ozone NAAQS under Subpart 1." Pet. 27. In particular, Section 181(a) states that it applies to "[*e*]*ach* area designated

nonattainment for ozone *pursuant to section 7407(d)* [*CAA section 107(d)*]"; and Section 107(d), in turn, governs the "promulgation *or revision* of a national ambient air quality standard." *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added); CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i) (emphasis added). Subpart 2 thus applies by the plain terms of Sections 107(d) and 181(a)(1) to *any* "ozone" NAAQS, including a revised ozone NAAQS.

EPA thus finds itself with no rejoinder for the argument that "Congress has spoken to the precise question at issue" and resolved it adverse to EPA. *See* App. 38a (citation and internal quotation marks omitted). The argument EPA tried below, that section 172 provides authority to enforce a revised NAAQS entirely apart from section 181(a) and the rest of Subpart 2, *see* EPA Ozone Br. at 67, is of no help, for that section emphasizes that it "shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part." CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C).

In the court of appeals, EPA also argued that Section 181(a)(1)'s reference to the entirety of "Section 107(d)" is a scrivener's error, and that Subpart 2 should instead be read to apply only to designations made under particular parts of Section 107(d). *See, e.g.*, App. 79a. But as the D.C. Circuit explained, there is no basis for deeming the plain language of Section 181(a)(1) the "drafting error that the EPA's interpretation implies." *Id.* at 39a. In fact, "all five Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d)" in its entirety. *Id.* at 79a. EPA's "interpretation" thus posits not an isolated scrivening error, but a total scrivening breakdown.

Although derided by EPA as "highly technical," App. 28 n.16, the appellate court's analysis is a conventional, straightforward, statutory interpretation under the first prong of *Chevron*. EPA now downplays all of this evidence in an extended footnote that argues in favor of a fuzzy, multi-factor

analysis conducted under the rubric of "context." But that analysis identifies factors that might be relevant, at most, to *resolving* an ambiguity. *See* Pet. 28 n.16. Such considerations certainly cannot be used to *create* an ambiguity in the first place. *See* App. 43a. Moreover, if any ambiguity did exist, it would undoubtedly be resolved to EPA's disadvantage based on the persuasive evidence that Congress specifically considered and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims the *enacted* statute does. *See* App. 39a (discussing the drafting history of the 1990 amendments).

Whatever interpretation EPA may devise after taking "full opportunity" for further reflection, Pet. 21, the fact will remain that Congress replaced the pre-1990 discretionary regime of EPA ozone enforcement with a more stable, democratically-legitimate regime of *congressionally-mandated* controls. EPA may ask Congress to amend the Act, but it is not free to repeal Subpart 2, either by deeming it a "drafting error," or by invoking some insubstantial notion of "context." *See* App. 39a.

C. The Subpart 2 Ripeness/Finality Question Does Not Warrant *Certiorari*.

The remaining question EPA presents is largely contrived. EPA never argued that its Subpart 2 ruling was not final until *after* the panel had decided this issue against it. *See* App. 77a. Nor did the Agency devote more than a sentence of its court of appeals brief to its half-hearted ripeness challenge. *See id.* at 79a. Not surprisingly, the panel on rehearing summarily and unanimously rejected EPA's newfound position, App. 77a-79a, and not a single member of the *en banc* court disagreed.

1. The Subpart 2 Implementation Issues Were Included Within Other Unquestionably Final and Ripe Claims. EPA now complains loudly that the court below should have determined only whether Section 181 of Subpart 2 "precluded EPA from *promulgating* the revised standard," without ever addressing whether that section governed "how EPA could

implement the revised NAAQS." Pet. 21 (emphasis added). But that argument imagines a procedural history divorced from reality. In the actual proceedings, these two claims that EPA imagines as different were in fact one and the same claim.

EPA acknowledges, as it must, that the respondents argued before the agency that Section 181 "precluded EPA from revising the ozone NAAQS" pursuant to Section 109. Pet. 7. That argument rested on two premises: (1) what might be called the "implementation premise," the claim that section 181(a)(1) of the Act directs EPA to classify "each" nonattainment area for ozone according to the Subpart 2 categories, and (2) what might be called the "designation premise," the claim that section 107(d) requires "EPA to designate *all areas*" and requires a nonattainment designation for "*any* area that does not meet the NAAQS." J.A. (Ozone) at 3140-41. These two premises led respondents to conclude that the Act "expressly forbids downward revisions (but not upward revisions) to the 0.120 standard," *id.* at 3139, because in making such revisions, EPA would be "forced to violate the Act" – by discarding either section 181(a)(1) or section 107(d) or both.

Confronted with this argument in the agency rulemaking, EPA responded almost exclusively to the "implementation premise," arguing that Section 181 does not "prohibit[] EPA from revising the [ozone] standard" under Section 109 *because the Agency may "implement the revised [ozone] standard" outside of the Subpart 2 framework.* 62 Fed. Reg. at 38,885; *see also* EPA Ozone Br. at 67-72. Moreover, in the Court of Appeals, EPA continued to defend its authority to *promulgate* a revised standard based on its disagreement with the "implementation" premise, while implicitly contesting, but never fully discussing, the "designation" premise. *See* EPA Ozone Br. at 67-72.

To resolve this dispute, as it did, under step one of *Chevron*, the court of appeals necessarily had to bring to bear the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including analysis of the statute as a whole. Also

under *Chevron*, the court had a duty to use as a starting point the implementing agency's own construction; that is, to address the specific link in the chain of logic that the EPA itself predominately contested – the "implementation" premise. Accordingly, if EPA's ripeness and finality concerns now seem at all plausible, it is only because they emit a distorted echo of two entirely innocent facts. The court below, in addition to ruling *against* EPA on the implementation issues it *did* contest vigorously, went on to rule *in EPA's favor* on the designation issues it *failed* to contest vigorously. In addition, the court composed an opinion that presents these issues in what it considered a comprehensible order, without noting that it was bound to rule first on the implementation premise that the agency itself had used as its primary legal defense.

2. *The Decision Below Is Not in Conflict With Decisions of this Court or Other Circuits.* There is no support whatever for EPA's contention that the court of appeals "adopted a test for finality that is inconsistent with the test applied by this Court and other courts of appeals." Pet. 10, 21. In particular, EPA's contention that this Court should accept review because the D.C. Circuit's decision "distorts" this Court's decision in *Bennett v. Spear* is mystifying. *See id.* at 22 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)).

Bennett merely repeats the well-established standard for administrative finality. *See* 520 U.S. at 177-78 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 113 (1948)). The Court there held that the agency ruling at issue was final because it "alter[ed] the legal regime" – even though it did *not* "conclusively determine" the plaintiffs' rights. *See Bennett*, 520 U.S. at 177, 178. As that holding suggests, the two prongs of the finality test recited in *Bennett* are not the inflexible rules that EPA makes them out to be. Rather, "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in

a pragmatic way" by taking a "flexible view of finality." *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980) (internal quotations omitted).

Here, the panel unanimously held that the Agency's Subpart 2 ruling is final because (1) it is not tentative, and (2) legal consequences flow from it. *See* App. 77a-78a. There is no sense in which that decision conflicts with *Bennett*. Rather, the most that EPA could plausibly contend is that the D.C. Circuit misapplied "a properly stated rule of law," a claim that does not supply a proper ground for *certiorari*. *See* Sup. Ct. R. 10; *Magnum*, 262 U.S. at 163.

Nor does the D.C. Circuit's decision stand in conflict with decisions of other courts of appeals. In particular, the *Dow Chemical* case highlighted by the Government holds only that statements made "while requesting certain data" prior to the initiation of an enforcement action, as well as statements made in an "amendment of [an] enforcement suit," are not final agency action. *See Dow Chem. v. EPA*, 832 F.2d 319, 324, 325 (5th Cir. 1987). The other cases cited by the Government similarly hold only that the initiation of an administrative investigation or adjudicatory process, or the announcement of an interlocutory ruling in the course of an ongoing administrative proceeding, is likewise not final. *See Mobil Exploration & Producing U.S., Inc. v. Department of Interior*, 180 F.3d 1192, 1199 (10th Cir. 1999); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 289 (5th Cir. 1999); *Hindes v. FDIC*, 137 F.3d 148, 162-63 (3d Cir. 1998). Those cases all involved truly interlocutory matters, not, like this case, a final rule, published in the *Federal Register*, and made expressly reviewable by statute. *See* CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1). Moreover, the absence of any circuit split is further underscored by the fact that *Mobil Exploration* explicitly relied on D.C. Circuit precedent, *see* 180 F.3d at 1199, while *Dow Chemical* specifically distinguished as inapposite one of the very D.C. Circuit cases on which the panel below relied. *See*

832 F.2d at 325 n.35 (distinguishing *Ciba-Geigy v. EPA*, 801 F.2d 430 (D.C. Cir. 1986)); App. 77a (quoting *Ciba-Geigy*).

3. The Court of Appeals' Decision Is Correct. On the merits, EPA appears to be claiming that its Subpart 2 ruling will not be final until a revised ozone NAAQS is actually implemented and enforced in a specific area. *See* Pet. 22. In particular, EPA argues that the first prong of the finality test is not met because it has not "completed its decisonmaking process under the governing statute for the specific agency action at issue," since it "has not designated nonattainment areas, classified those areas, or set attainment dates" for those areas. *Id.* The Agency similarly contends that the second prong is not satisfied because "ATA will not be affected by EPA's views on implementation of the revised ozone NAAQS until the agency takes actual steps to implement the NAAQS by designating and classifying nonattainment areas and setting attainment dates." *Id.* at 23.

But EPA did far more in the rulemaking below than merely promulgate the revised NAAQS. Based on its "interpretation" of "the provisions of subpart 2," EPA's final ozone rule specifies the point at which Subpart 2 and the existing ozone NAAQS "will no longer apply." 62 Fed. Reg. at 38,873; *id.* at 38,894 (codifying this ruling into 40 C.F.R. § 50.9(b)). The Agency also determined, simultaneously with the ozone NAAQS revisions, how and where its new ozone NAAQS would be enforced. 62 Fed. Reg. 38,423, 38,424-27 (1997). EPA then issued three final rules revoking the existing ozone NAAQS in certain areas. *See* 64 Fed. Reg. 30,911 (June 9, 1999); 63 Fed. Reg. 39,432 (July 22, 1998); 63 Fed. Reg. 31,014 (June 5, 1998). Only after the D.C. Circuit issued its opinion in this case did EPA cease its "continu[ing] implementation efforts with respect to the 8-hour standard." 64 Fed. Reg. at 57,425.

In any event, the Government's argument against pre-implementation review "has the hollow ring of another era." *Port of Boston*, 400 U.S. at 71. Modern finality jurisprudence

has "interpreted pragmatically the requirement of administrative finality, focusing on whether judicial review at the time will disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779 (1983). This Court has specifically rejected the "argument that [an] order lacked finality because it had no independent effect on anyone and resembled an interlocutory court order," *Port of Boston*, 400 U.S. at 70-71, and has routinely authorized pre-enforcement review of agency determinations. *See, e.g., Bell*, 461 U.S. at 779-80; *Harrison v. PPG Indus.*, 446 U.S. 578, 586 (1980) (EPA ruling final under CAA § 307(b)(1) where "[s]hort of an enforcement action, EPA has rendered its last word on the matter"); *Port of Boston*, 400 U.S.at 70-71; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 149-51 (1967) (citing cases).

As the D.C. Circuit has repeatedly held, these precedents have particularly strong force in the context of the Act. Congress has, on the face of that statute, "declared a preference for prompt review" by providing that petitions for review of EPA rulemakings must be filed "within 60 days from the date notice of such . . . action appears in the federal register." *See NRDC v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (citing CAA § 307(b)(1)) (internal quotation omitted); *Her Majesty the Queen in Right of Ontario v. U.S. E.P.A.*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (same). The D.C. Circuit has therefore always understood EPA's general NAAQS implementation rulings (as opposed to its specific classification decisions) to be final even before they have been applied in the context of a particular state's submission of a SIP. *See NRDC*, 22 F.3d at 1133.

So has EPA. Tellingly, EPA accepted the D.C. Circuit's virtually identical ruling in *NRDC* without even petitioning for review in this Court. More telling still, in a different proceeding before the D.C. Circuit last summer, EPA argued that a separate petition for review that challenged the Agency's now-suspended implementation of the revised ozone NAAQS was precluded precisely because *this case* is the proper vehicle for resolving such challenges. In particular, EPA contended that because the

Agency's "legal interpretation of the interplay of Subpart 2 and EPA's NAAQS revision authority" was "resolved by the 1997 Rule" (*i.e.*, the rulemaking below), challenges to that interpretation had to be brought in *this* proceeding, not in subsequent actions challenging specific implementation decisions. *See* Br. of Resp. U.S. E.P.A. in D.C. Cir. No. 98-1363 (filed June 21, 1999), at 27-28, 29-30.

In sum, EPA would have this Court grant *certiorari* and hold its Subpart 2 ruling non-final even though (1) the D.C. Circuit had to resolve the Subpart 2 issue in the course of deciding whether EPA had authority to promulgate the revised ozone NAAQS; (2) EPA recognized as much by not disputing the finality of its ruling until after it lost in the court of appeals; (3) there is no circuit conflict for this Court to resolve; (4) this Court has long emphasized that the finality test is pragmatic and flexible; (5) EPA began implementation activities in the underlying rulemaking itself; (6) Congress expressed a desire for prompt pre-implementation review of EPA's actions under the Act; (7) multiple panels of the D.C. Circuit have long rejected EPA's contention; and (8) EPA is trying to have it both ways in order to evade judicial review altogether. There is no justification for *certiorari* in such circumstances.

EPA's ripeness challenge fails for similar reasons. The "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (internal quotation omitted). Accordingly, this Court has consistently held EPA rulings to be fit for review where, as here, "[t]he issue presented . . . is purely legal, . . . will not be clarified by further factual development," and has had pre-enforcement effects such as those described above. *See id.* at 581; *see also EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980). Moreover, this Court has authorized pre-implementation review of a variance clause in an EPA regulation where the validity of the variance clause was intertwined with the validity of the

regulation as a whole. *See National Crushed Stone*, 449 U.S. at 72 n.12. As explained above, that is precisely the situation that the court of appeals confronted here: interpretation of Subpart 2 is intertwined with an argument made below (but not in this Court) regarding interpretation of EPA's authority to revise the ozone NAAQS. The issue was therefore ripe for review in the court below.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* on a properly formulated question which encompasses the statutory interpretation issues covered in ATA's conditional cross-petition. The Court should deny the Government's petition on the second and third questions presented, as well as all questions presented by the American Lung Association and the State Petitioners.

Respectfully submitted,

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Nos. 99-1257, 99-1263, 99-1265 and 99-1426

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

AMERICAN LUNG ASSOCIATION,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

(*Case Captions Continued on Inside Cover*)

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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Petitioners,

v.

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Respondents.

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Cross-Petitioners,

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Cross-Respondents.

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BRIEF OF *AMICUS CURIAE* MERCATUS CENTER AT GEORGE MASON UNIVERSITY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI AND IN SUPPORT OF THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Mercatus Center at George Mason University is a nonprofit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3), whose Regulatory Studies Program ("RSP") is dedicated to advancing knowledge of administrative regulations and their impact on society.* RSP submitted comments to the Environmental Protection Agency on the proposed national ambient air quality standards for ozone and particulate matter that are the subject of the Petitions herein. Its comments focused on the inadequacy of the scientific foundation of the proposed standards and on the disproportionate risks they would impose on the general population, both because ozone provides direct health benefits that should be considered, and because the extraordinary cost of achieving the standards would adversely affect public health.

The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court.

ARGUMENT

I. INTRODUCTION AND BACKGROUND

The central issue in the petitions for a writ of certiorari filed separately by the Environmental Protection Agency

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* Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

("EPA"), the American Lung Association ("ALA"), and Massachusetts and New Jersey ("States") is whether the court of appeals properly interpreted the nondelegation doctrine when it reversed and remanded the National Ambient Air Quality Standards ("NAAQS") for ozone and particulate matter because EPA's interpretation of Section 109 of the Clean Air Act ("CAA") stated no "intelligible principle" on which the levels were based.

Petitioners rely primarily on three contentions to justify review. First, they argue that as a matter of public policy, the ozone and particulate matter rules are fundamentally sound and of "immense practical importance to the health of the American public." EPA Pet. 9; see State Pet. 26-28; ALA Pet. 15-17. Second, they assert that the lower "court's decision represents a radical departure from settled law respecting the nondelegation doctrine." EPA Pet. 9; see *id.* 11-19. Third, they charge that the lower court's ruling would improperly "expand the role of courts in reviewing agency action." *Id.* 9.[1]

None of Petitioners' arguments is meritorious. First, the EPA rules will not improve public health. They are

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[1] We do not address the issue raised by EPA but not by other petitioners, namely, whether EPA had taken final action and, thus, whether the Subpart 2 implementation issues were ripe for review. EPA Pet. 19-21. Contrary to the EPA petition, we believe it is clear beyond reasonable argument that the EPA's action here—"two *final* EPA rules establishing revised National Ambient Air Quality Standards (NAAQS) for particulate matter and ozone," EPA Pet. 2 (emphasis added)—"alters the legal regime to which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (biological opinion isued by Fish & Wildlife Service under Endangered Species Act constitutes final agency action). The EPA rulemaking "implicate[s] the viability of massive regulatory programs which rely upon both the validity and enforceability of the revised ozone and PM NAAQS." State Pet. 26. The EPA petitioners dispute the application of the finality/ripeness tests but identify no conflict among the circuits on this issue or confusion in the criteria to be applied.

based on highly uncertain evidence and ignore important countervailing health considerations.

Second, the lower court did not misunderstand the nondelegation doctrine. It applied the doctrine in a traditional and reasonable fashion, focusing on the absence of any intelligible standard in the agency's interpretation of the CAA and identifying how the agency might construe the statute to save it from being found invalid.

Third, the appeals court did not apply the nondelegation doctrine to reverse a Congressional delegation to the EPA, nor did it, itself, reinterpret the statute to conform to its views of the constitutional norm. Instead, it took a far less intrusive approach, consistent with this Court's decision in *Chevron*, of remanding the matter to the agency for EPA to interpret the CAA consistent with the "intelligible principles" requirement of the nondelegation doctrine.

Under the Clean Air Act, EPA is to set NAAQS at levels "requisite to protect the public health" with an "adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. § 7409(b)(1). In the case of ozone and particulate matter ("PM"), EPA's evidence suggests that there is no threshold below which either pollutant would not pose health threats. However, EPA failed to identify specific standards or measurable factors consistent with the CAA as the basis for the NAAQS levels it selected. It interpreted the CAA as allowing it to choose any point along a "linear nonthreshold" [2] continuum and to claim that the

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[2] The linear, nonthreshold dose-response model that EPA uses in its analysis relates the predicted change in health effects to a change in the concentration of PM or ozone. Unlike other chemicals regulated by EPA under this section of the CAA, EPA has no scientific evidence of a threshold concentration below which PM or ozone will not have health effects. This is the nonthreshold aspect of the model. The linear aspect of the model assumes that regard-

selected point provides an adequate margin of safety—without regard to whether that margin could be satisfied at a less stringent level.

Because the linear nonthreshold model attributes health benefits to each further reduction in ozone and PM, no matter how clean the air already may be, and without regard to the overall effect on public health, EPA's interpretation of the CAA would allow it to set the level for each at zero. It relies upon "policy judgments" to justify its selected standards. Thus, any level chosen by EPA—"any point between zero and a hair below the concentrations yielding London's Killer Fog," Pet. App. 13a—is automatically permissible under the agency's reading of the CAA because, according to EPA, the statute imposes no limits on its policy judgment.

The basic fault in EPA's misguided interpretation of the CAA, and thus of its NAAQS rules, derives from the D.C. Circuit's decision in *Lead Indus. Assn. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980), holding that § 109 of the CAA prohibits the consideration of "any factor other than 'health effects relating to pollutants in the air' " in setting NAAQS levels. *See* Pet. App. 15a. This reading of the CAA is not supported by the text, structure, context or legislative history of the Act, see ATA Cross-Pet. 14-15, or by rational policy analysis. Protecting public health necessarily involves consideration of a broad range of factors, including trade-offs between different health effects and the costs of implementing a standard, because large costs themselves can have negative public health consequences.

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less of the overall concentration of ozone or PM to which an individual is exposed, a one unit change in that concentration will have the same marginal effect.

II. EPA'S OZONE AND $PM_{2.5}$ RULES ARE LIKELY TO HARM PUBLIC HEALTH BECAUSE THEY IGNORE TRADE-OFFS AND OTHER HEALTH EFFECTS

EPA's revised NAAQS would reduce the allowed level of ground-level ozone by about 10 percent and regulate very fine particles ($PM_{2.5}$) for the first time. It argued that these revisions were necessary to protect the public from respiratory health effects, especially asthma. Contrary to EPA's assertions that these rules would make a significant contribution to public health, the standards have little scientific merit, were not endorsed by EPA's own scientific advisors, and were based on unduly narrow health considerations. EPA has presented no evidence that the new standards are achievable, and even if they were, EPA cannot demonstrate that they are likely to be more protective of public health than current NAAQS levels. In fact, the opposite is true.

For the ozone standard, EPA's Clean Air Scientific Advisory Committee ("CASAC"), a legislatively-established body of independent experts which provides advice to EPA on scientific and engineering issues, concluded that "there is no 'bright line' which distinguishes any of the proposed standards (either the level or the number of allowable exceedances) as being significantly more protective of public health." CASAC Letter to Carol Browner *re: Ozone* (November 30, 1995) Ozone JA 238. Moreover, the majority of members on the panel who expressed an opinion preferred a level less stringent than that proposed by EPA. *Id.*

Similarly for the PM standard, CASAC could find no consensus for selecting "the level, averaging time, or form of a $PM_{2.5}$ NAAQS." CASAC Letter to Carol Browner *re: Particulate Matter* (June 13, 1996) PM JA 3162. Only 2 of the 21 scientists on CASAC were willing to

endorse a general range as stringent as the range adopted in EPA's $PM_{2.5}$ standard. *Id.* 3165.

EPA ignored other important information relevant to public health in setting the ozone and PM levels. For example, it acknowledged that, due to ozone's screening effect on harmful ultraviolet-B radiation, the reduction in ozone levels mandated by the NAAQS will increase malignant and nonmelanoma skin cancers and cataracts. EPA, *Calculations of the Impact of Tropospheric Ozone Changes on UV-B Flux and Potential Skin Cancers* (Draft) (September 1994) (Cupitt, Larry T.) Ozone JA 3089-3104. Nonetheless, EPA ignored these data in setting the ozone standard. In uncontradicted evidence submitted to EPA, the Department of Energy projected that a 10 ppb reduction in ozone concentrations, as required by the ozone rule herein, would result in 25 to 50 new melanoma-caused fatalaties, 130-260 incidences of cutaneous melanoma, 2,000-11,000 new cases of nonmelanoma skin cancer, and 13,000 to 28,000 incidences of cataracts each year. Statement of Marvin Frazier, DOE Office of Health & Environmental Research, Before CASAC (March 21, 1995) Ozone JA 258-59. These negative health effects of the ozone standard dwarf EPA's projected positive health effects, which do not include any reduction in deaths. *See* Susan E. Dudley & Wendy L. Gramm, *EPA's Proposed Ozone Standard May Harm Public Health and Welfare,* 17 Int'l J. of Risk Analysis 403 (August 1997).

EPA itself concedes that the costs of the new ozone regulation will far exceed its benefits, but asserts that under *Lead Industries* the agency may not consider implementation costs when setting NAAQS. *EPA Ozone Rule,* 62 Fed. Reg. 38,855, 38878 (July 18, 1997); *Regulatory Impact Analysis,* Ozone JA 2924, 2934 (July 16, 1997). Yet mounting research shows that regulatory costs do affect public health because such costs represent fore-

gone opportunities to improve health and safety—e.g., disease prevention, better diets and improved sewage treatment. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 23 (1993) ("deprivation of real income itself has adverse health effects, in the form of poorer diet, [and] more heart attacks"). Studies linking income and mortality find that every $15 million decline in incomes results in one statistical death. Randall Lutter, John F. Morrall, III, W. Kip Viscusi, *The Cost-Per-Life-Saved Cutoff for Safety-Enhancing Regulations*, 37 Economic Inquiry 599 (October 1999). Applying this analytical framework to the ozone and PM rules herein, the Mercatus Center's Regulatory Studies Program estimates that full compliance could exceed $100 billion per year and increase mortality by over 6,500 deaths per year (not including the increase in melanoma deaths from UV-B exposure). *See RSP Comments in EPA Ozone/PM Rulemaking* (submitted March 12, 1997) (available at www.gmu.edu/mercatus/).

This disregard for the "wealth-health" effect is a direct result of the D.C. Circuit decision in *Lead Industries* barring consideration of costs because the CAA "makes no mention of such factors." 647 F.2d at 1149 n.37. Both EPA and the lower court interpreted *Lead Industries* as limiting the NAAQS rulemaking to direct health effects and as not permitting consideration of the costs and their relationship to benefits imposed by the rule and of whether the costs imposed by the rule will result in a net reduction in human health or a net increase in lives lost. ATA Cross Pet. 6. However, as the ATA Cross Petition shows, the ruling in *Lead Industries* is based on an erroneous reading of the CAA, has been extended improperly beyond its basis, is contrary to the principles and rationale of this Court's ruling in *Benzene* (discussed *infra* pp. 13-14), and should be reconsidered as urged by Respondents below. ATA Cross Pet. 14-18.

III. REQUIRING EPA TO IDENTIFY "INTELLIGIBLE PRINCIPLES" DERIVED FROM THE CLEAN AIR ACT IS CONSISTENT WITH ESTABLISHED PRECEDENTS

This case does not require application of the nondelegation doctrine to overturn the CAA or otherwise to interfere with broad legislative delegations of administrative authority. It also does not require that the doctrine be revised before being applied as a prophylactic canon of construction. Finally, the Court need not consider whether the CAA's defining terms—that the NAAQS standards must "protect the public health" with an "adequate margin of safety," CAA § 109(b)(1)—are unconstitutionally unconfined and therefore should be overturned.

Rather, the issue here is a narrow one. The court below limited its ruling and held only that it is the agency's responsibility to interpret the statute, if possible, in a manner that is consistent with the principles of the nondelegation rule. What the court said is that EPA is *not* free to read the CAA terms as setting virtually no definable limits on the agency's authority when setting NAAQS for ozone and PM, while ignoring a more specific construction that could provide a principled basis for the agency's rules.

We believe that the analysis applied by the court below is correct and consistent with numerous cases decided since 1935 and 1936 when the doctrine was last applied by this Court to directly invalidate a Congressional enactment. Administrative agencies are obliged to interpret their authority to avoid unchanneled delegations of discretion to the agency. To rule otherwise is to raise the specter of "delegation[s] running riot," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring), and to disregard the first operative sentence of the Constitution that "[a]ll legislative

Powers herein granted shall be vested in a Congress of the United States." U.S. Constitution, Art. I, § 1; *see also id.* Art. I, § 8.

A. Under the Nondelegation Doctrine, Congressional Legislation Must Be Interpreted, If Possible, as Providing Guidance for Measuring the Limits and Lawfulness of Agency Action

The core requirement of the nondelegation doctrine is undisputed by Petitioners. EPA Pet. 13. It establishes that legislative authority delegated by Congress to the executive must state "intelligible principles," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), by which the agency is given a "primary standard" to guide its action. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); *see Clinton v. City of New York*, 524 U.S. 417, 484-96 (1998) (Breyer, J., dissenting). It is satisfied where "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

That the nondelegation doctrine is rarely applied to invalidate legislation does not mean that it has been abandoned or that it is without continuing substantial influence. *See South Dakota v. United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (invalidating Indian Reorganization Act authorizing Interior Secretary to acquire lands in trust for tribes because Act provided no "intelligible principles" for determining when that authority could be exercised), *vacated & remanded on change in petitioner's position*, 519 U.S. 919, 920-23 (1996). It has an "important and continuing 'shadow' impact" on the reading and review of legislative delegations. P.

Strauss, T. Rakoff, R. Schotland & C. Farina, *Cases and Comments on Administrative Law* 92 (9th ed. 1995).

For example, in *Touby v. United States*, 500 U.S. 160 (1991), the Attorney General's broad discretion to temporarily add or remove psychoactive drugs from the "schedules" of prohibited or regulated controlled substances was upheld. In upholding this authority, however, the Court relied heavily on two concessions by the Government which more narrowly confined the Attorney General's discretion. First, it acknowledged that a drug could not be added to Schedule I (the most harmful category) without first being subject to additional testing. Second, the provision freeing temporary scheduling orders from judicial review did not preclude a defendant facing criminal charges from asserting a challenge to the temporary scheduling order as a defense to the prosecution. *See id.* 170 (Marshall, J., concurring).

Thus, the nondelegation doctrine does not mean that Congress cannot delegate broadly or allow executive agencies substantial discretion. And there are numerous examples, which Petitioners trumpet, EPA Pet. 12 n.5, of facially open-ended statutory "standards" that delegate to an agency the power to determine what are "excessive profits," "fair and equitable" prices, "just and reasonable rates," and "unfair methods of competition" which have been upheld. But in every case, the Court has identified specific limits or compelling constitutional reasons justifying the delegation before upholding the statute or rule.

What Petitioners fail to recognize is that these open-ended statutory standards have been upheld only after finding an exceptional circumstance (e.g., relying on the President's extensive war powers or authority to conduct foreign affairs) justifying the delegation or because the executive discretion was bounded by precedent, recognized principles implicit in the statute, or other similar restric-

tions. For example, *Yakus v. United States*, 321 U.S. 414 (1944) and *Lichter v. United States*, 334 U.S. 742 (1948) are emergency wartime measures where "broad discretion . . . may be essential." *Id.* 779. *Fahey v. Mallonee*, 332 U.S. 245, 249-53 (1947) upheld broad powers to oversee banking because a long history of such regulation had established specific common law standards which guided the regulators. And *Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.) upheld non-wartime wage and price controls only after finding that the administrative authority was confined by price control precedents and after incorporating other restrictions including APA procedures and opportunities for judicial review in the regulatory program.

There also are even more cases where administrative action was upheld only after the Court "reinterpreted" the statute to find an implied condition limiting the facial agency authority. *E.g., Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342-43 (1974) (narrowing basis for FCC to set cable television fees); *Zemel v. Rusk*, 381 U.S. 1 (1965) (reading areas of restrictions on passports as limited by "prior administrative practice"); *Kent v. Dulles*, 357 U.S. 116 (1958) (reading passport authority narrowly to deny Secretary of State power to refuse a passport on grounds of political belief). The typical application of the nondelegation doctrine, in fact, is by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States, supra* at 374 n.7; *see also Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222-23 (1989).

B. The Clean Air Act Could Satisfy the Nondelegation Doctrine If It Were Interpreted as Implying Limits on EPA's Authority to Set NAAQS Levels

The lower court here similarly found EPA's interpretation of the CAA inadequate because the agency had failed to find any limit on its authority to select the levels at which the ozone and PM standards were to be set. The D.C. Circuit held that § 109 and related sections of the Act must be construed to provide an "intelligible principle" that guides the exercise of agency discretion. Finding that EPA had failed to define such a standard in the CAA, the court remanded the rules for "EPA to develop a construction of the act that satisfies this constitutional requirement." Pet. App. 4a.

The Government's Petition now claims to have found a standard in EPA's interpretation of the CAA because the Act "requires EPA to develop the [limiting substantive] 'criteria' " in accordance with established rulemaking and judicial review procedures in § 307(d), 42 U.S.C. § 7607(d), and as derived from the Act's legislative history which references "adverse effects." EPA Pet. 13-15 & n.8. However, this description of EPA's approach has no support in the record and is inconsistent with EPA's position below. This contrived effort to seek shelter under the *Benzene* ruling fails because the term "adverse" tells us nothing about the degree of harm which must be found. To say that something must be "unfavorable" or "harmful" [3] does not tell us how harmful, or that the harm must be substantial or significant. In any case, EPA's rule cannot be upheld on a view not adopted by EPA but advanced for the first time by counsel before this Court. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appel-

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[3] *Webster's New World Dictionary* 21 (College Edition 1964) (defining "adverse" as something "unfavorable, harmful").

late counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated by the agency itself.").

The situation here is closely analogous to *Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion) (*Benzene*), where this Court reversed an OSHA rule issued by the Secretary of Labor that would have imposed stringent measures to minimize worker exposure to benzene, a cancer-causing chemical. According to the Court plurality, the rule could not be justified by the statutory terms requiring employers to protect their workers "to the extent feasible" from harm due to toxic substances because feasibility was not, at least on its face, a sufficiently limiting requirement. However, after reviewing the organic act, its terms and context, the plurality determined that the "feasibility" requirement was adequate because it required the Secretary to make a finding that the preexisting situation created a "significant risk" (which the OSHA rule could then alleviate). With that addition, the impermissibly standardless facial authority was held to satisfy the nondelegation doctrine. That is, the plurality narrowed the feasibility standard in the statute by interpreting it as including a significant risk test. It then remanded the matter to the agency for reconsideration of the rule under the revised interpretation of its statutory authority.[4] As here,

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[4] The *Benzene* plurality became a majority with the vote of then-Justice Rehnquist who would have invalidated the statute as an impermissible delegation. He found the statute's "to the extent feasible" standard a "mirage" and unconstitutional because Congress had delegated to the Secretary the "fundamental" policy decision of "where on the continuum of relative safety [the Secretary] should draw his line." 448 U.S. at 675, 681, 687-88. Under its interpretation of § 109 of the CAA, EPA claims the same discretion here.

however, the facially open-ended grant of authority to the agency was not upheld and the agency was afforded the opportunity to apply the corrected standard in developing its rule.

The lower court similarly remanded the rule to the agency for revision in accordance with a standard consistent with the nondelegation doctrine. However, it took a less intrusive path than that outlined in *Benzene*. It found only that, as applied, EPA's interpretation of CAA § 109 allows it untrammeled discretion that would, if not corrected, violate the nondelegation doctrine. But the court did not interpret the statute itself or tell the agency what the criteria must be under its terms. It merely held that, as interpreted by EPA, § 109 sets no limit on the agency's authority, and that under this view any level identified in the NAAQS would satisfy the CAA. Under the *Benzene* precedent, the reviewing court could have examined the statute for itself, determined its meaning (at least if it found that the intent of Congress was clear, see pp. 14-16 *infra*), and directed the agency to revise the rule in accordance with this interpretation (i.e., in a way that properly applied the reinterpreted "protect public health" with an "adequate margin of safety" test). Instead, the court below took the more limited step of remanding the matter to EPA with the direction that the agency reinterpret § 109 consistent with the nondelegation doctrine (if possible) and that under this revised understanding it identify a more specific foundation for setting the ozone and PM NAAQS.

C. Requiring the EPA to Identify the Ranking Criteria for Determining the Level of Nonthreshold Pollutants Is Consistent with *Chevron*

The ruling below that EPA, rather than the reviewing court, should determine the meaning of § 109 consistent

with the nondelegation doctrine, is also required by recognized standards for judicial review of agency action. Under *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984), courts are to defer to reasonable agency interpretations of statutes that do not clearly reveal Congress' intent on the precise issue in question. Just as EPA was allowed in *Chevron* to determine whether Congress meant EPA's regulation of "stationary sources" of pollution to be measured solely by each individual source or on a plant-wide basis, here it is for EPA to interpret the meaning of § 109 and to identify criteria consistent with Congress' intent.

The identification of the numerical equivalent or degree of an "adequate margin of safety" for nonthreshold pollutants is essentially a legislative task consistent with EPA's authority to issue legislative rules such as NAAQS standards. Thus, it is particularly appropriate that the agency be directed to fill in the meaning of this statutory standard through legislative rulemaking. *See Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996) (Posner, C.J.) (numerical requirements are inherently "arbitrary" and involve legislative judgments which agencies are better positioned than courts to make). EPA's interpretation shall be upheld if reasonable, including therein that as interpreted the statute satisfies the nondelegation doctrine.

Enforcement of the nondelegation doctrine, to require that the NAAQS levels be consistent with Congress' stated purpose of protecting the public health with an adequate margin of safety, is consistent with sound policy. Not only are agencies quasi-legislative bodies and accountable to the people through the President's authority over them, but also EPA is the body best positioned to determine what Congress intended when it approved the provisions of § 109. 467 U.S. at 865-66. In addition, under *Chevron*, the agency interpretation is not "carved in stone" and can be modified as necessary to meet changing circum-

stances. It has greater flexibility and can move more quickly to revise the interpretation of the underlying criteria when change is required. And as long as that change is plausible and justified by reasons for the change, it will not be disturbed on judicial review. *Id.* at 863-64.

IV. REVIEW OF LEGISLATIVE RULES UNDER THE "ARBITRARY AND CAPRICIOUS" TEST OF THE APA IS NO SUBSTITUTE FOR THE NONDELEGATION DOCTRINE

Finally, review of agency action under the "arbitrary and capricious" test under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is no substitute for application of the nondelegation doctrine to control standardless discretion. The nondelegation doctrine, as applied by the court of appeals, requires that EPA determine Congress' intent when it prescribes NAAQS to protect the public health with an adequate margin of safety. As long as EPA's interpretation of the Congressional intent confines administrative discretion within understandable bounds, it will not be disturbed by the nondelegation doctrine on review. And as long as that interpretation by EPA is reasonable—i.e., a permissible and reasonable interpretation of § 109—it will be upheld under *Chevron*.

On the other hand, application of the arbitrary and capricious test under § 706(2)(A) of the APA requires that the particular NAAQS levels selected by EPA must reflect a reasoned decision. That is, the facts must be supported by sufficient evidence before the agency, and the inferences drawn from them as well as the policy rationale and ultimate conclusions must be adequately explained and justified. *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

The nondelegation doctrine looks to the interpretation given the Congressional statute and asks whether the authorized administrative action is confined by intelligible standards. By contrast, the arbitrary and capricious test does not look at the statutory authority and its definiteness. Rather, it examines the administrative action itself and asks whether the rule is the product of reasoned decision making. Thus, the two requirements complement each other; but one is not a substitute for the other.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied and, alternatively, the cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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Nos. 99-1257, 99-1263, 99-1265, 99-1426, 99-1431, 99-1442

In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

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BRIEF OF STATE RESPONDENTS IN SUPPORT OF ATA AND CAA INDUSTRY'S CONDITIONAL CROSS-PETITIONS

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QUESTION PRESENTED

Whether the Clean Air Act requires that the Environmental Protection Agency must, in setting national air quality standards, ignore all factors "other than health effects relating to pollutants in the air," given that consideration of such factors would permit both the Agency and reviewing courts to avoid confronting constitutional nondelegation issues.

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Appalachian Power Company, et al. and American Trucking Associations, Inc., et al. ("CAA Industry and ATA conditional cross-petitioners" or "conditional cross-petitioners") have submitted Conditional Cross-Petitions in this case, which arises from petitions for writ of certiorari to review *American Trucking Associations, Inc. v. U.S. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). The Conditional Cross-Petitions concern the scope of authority of the United States Environmental Protection Agency ("EPA" or "the Agency") to promulgate or revise a National Ambient Air Quality Standard ("NAAQS" or "standard") under the Clean Air Act ("CAA" or "the Act"). At issue in EPA's petition is whether the Act as construed by EPA creates an excessive delegation of rulemaking authority. The conditional cross-petitioners argue that, if the Court grants review to consider the delegation issue, the Court should also review the related question whether the statute has been properly construed to prevent EPA from considering the costs, as well as the benefits, of regulation.

Respondent States of Michigan and West Virginia oppose question one, and all three Respondent States oppose questions two and three of EPA's petition for certiorari. *See*, Respondent States' Brief in Opposition to Petitions for Certiorari. At the same time, however, Respondent States agree with conditional cross-petitioners' Conditional Cross-Petitions, urging this Court, if it grants certiorari on any of these questions, to also grant certiorari on the issue of whether EPA is authorized to consider factors other than health in setting or revising a standard under Section 109(b) of the Clean Air Act, 42 U.S.C. 7409(b); EPA App. 111a. [1]

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[1] Respondent States of Ohio, Michigan and West Virginia do not support the cross-petition of Citizens for Balanced Transport.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITIONS

The Clean Air Act provides that the only mechanism for review of ambient air standards is to petition in the District of Columbia Circuit. CAA §307(b)(1); 42 U.S.C. 7607(b)(1). Review by this Court is, therefore, the only procedure by which to correct a long-standing erroneous decision by the District of Columbia Circuit on EPA's consideration of costs in setting ambient standards under the Clean Air Act. In addition, a correct interpretation of EPA's authority under the Act will avoid altogether the need to reach the nondelegation issue in the first question presented of EPA's petition.

The case below represents the latest in a line of cases from the D.C. Circuit, following *Lead Industries Ass'n. v. U.S. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)("*Lead Industries*"), and holding that the EPA is bereft of discretion to consider the social, economic and environmental costs of, as well as the public health benefits of, a standard under Section 109. *Lead Industries* was wrongly decided, primarily because the language of Section 109 and related sections indicates that EPA has the authority to consider factors other than health when setting an air standard. Under Section 109, "ambient air quality standards" are set, "the attainment and maintenance of which in the judgment of the Administrator, based on such *criteria* and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b)(1); EPA App. 111a (emphasis supplied). The word "criteria" refers to Section 108; Section 108(a) includes a non-exclusive list of factors for setting criteria, and Section 108(b) requires EPA to collect information on cost and technological feasibility simultaneously with establishing a standard. In addition, Congress's direction in Section 109(d)(1) that EPA revise standards "as may be appropriate" in accordance with

Section 109(b) and Section 108, gives EPA discretion to consider factors such as costs. Finally, Section 109(d)(2)(c) requires an "independent scientific review committee" to advise the Administrator of any "adverse public health, welfare, social, economic or energy effects" that may result from revision of a standard. *Lead Industries* and its progeny were, therefore, wrongly decided.

In fact, the *Lead Industries* line of cases, including the case below, seemingly contradicts other cases from the District of Columbia Circuit interpreting other, similar provisions of the Act, as well as other administrative decisions. *See Michigan Department of Environmental Quality v. U.S. EPA*, 2000 U.S. App. LEXIS 3209 (D.C. Cir. 2000) ("*NOx SIP call*"); *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("*Vinyl Chloride*"). This Court can correct that conflict.

But perhaps most important to the Respondent States, this Court must overrule the D.C. Circuit's erroneous holding because its (and EPA's) interpretation of Section 109 potentially puts the States into an impossible box. Sections 108 and 110 of the Act, under recent D.C. Circuit decisions, *require* the States to consider economic and technological feasibility when implementing a standard for non-threshold pollutants, but the lower court's interpretation of Section 109 in this case *precludes* EPA from doing so. 175 F.3d at 1041; EPA App. 20a-21a. This interpretation creates a potential impasse between EPA and the States in implementing an air standard. The EPA, armed with complete discretion over a non-threshold pollutant and unable to consider economic or technological feasibility, could set a standard that its own data might demonstrate is realistically impossible for the States to achieve when cost and available technology are considered.

In order to resolve this impasse, if the Court grants certiorari in one or more of the petitions submitted in this case, it should also grant certiorari to the Conditional Cross-Petitions of the CAA Industry and ATA conditional cross-petitioners. In addition, the proper interpretation of Section 109 will preclude consideration of the delegation issue.

A. The Court Should Avoid Consideration Of The Non-Delegation Issue By Resolving The Statutory Cost-Benefit Issue.

As this Court has made clear on numerous occasions, it is the "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring). This case presents just such a situation. As demonstrated below, if the Court grants certiorari on the first question presented in EPA's petition, it should resolve the case by granting and resolving the issue presented in the Conditional Cross-Petitions, and avoiding the constitutional nondelegation issue presented by EPA.

The lower court correctly found that EPA has failed to find an "intelligible principle" for selecting a standard for ozone.[2] 175 F.3d at 1034; EPA App. 5a. It therefore correctly remanded the revised standard to the EPA "to give the agency an opportunity to extract a determinate standard on its own." 175 F.3d at 1038; EPA App. 14a. However, in

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[2] The Respondent States focus here on the ozone standard. However, most of the statements made for ozone apply equally to the standard for coarse and fine particulate matter ($PM_{2.5}$ and PM_{10}). *See, e.g.*, 62 *Fed. Reg.* at 38,688 (July 18, 1997) (PM); 62 *Fed. Reg.* at 38,883 (July 18, 1997) (ozone); Letter from Dr. George T. Wolff, Chair CASAC, to Hon. Carol M. Browner (Nov. 30, 1995), Ozone JA 237, *OAQPS Staff Paper*, PMJA 2068.

so doing, it was constrained by *Lead Industries* to deny EPA the one tool that would most help the Agency in selecting an ozone standard: cost-benefit analysis.

Ozone is a "non-threshold" pollutant; that is, there is no threshold amount, above which deleterious health effects are certain, and below which no or few health effects are known. As the lower court stated, "EPA regards ozone definitely, and PM likely, as non-threshold pollutants, i.e. ones that have some possibility of some adverse health impact (however slight) at any exposure level above zero." 175 F.3d at 1034 (EPA App. 5a), citing Ozone Final Rule, 62 *Fed. Reg.* at 38,863/3 (July 18, 1997). *See also Vinyl Chloride*, 824 F.2d at 1148 (a "non-threshold" pollutant is one which "appears to create a risk to health at all non-zero levels of emission"). *Cf. Lead Industries*, 647 F.2d at 1137-41 (discussing various thresholds for lead exposure used to support the air standard for lead). The court below also noted that "the only concentration for ozone . . . that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F.3d at 1034; EPA App. 6a.

In the absence of a health threshold for a pollutant, it is not surprising that EPA has difficulty articulating an "intelligible principle" based on health alone for its ozone standard, as *any* presence of the pollutant presents some threat to health. As the lower court stated, all the relevant variables related to health with regard to ozone "seem to range continuously from high to low." 175 F.3d at 1039; EPA App. 16a. Despite this acknowledgment, the lower court insists that EPA should be able to develop some health-based principle by which a standard can be developed. 175 F.3d at 1039; EPA App. 16a. And, also despite this acknowledgment, the lower court insists on its interpretation of Section 109(b), first articulated in *Lead Industries*, that EPA is barred from considering any factor other than health. 175 F.3d at 1038; EPA App. 14a-15a.

Ironically, the model suggested by the D.C. Circuit for EPA's use in "building blocks for a principled structure" is the Oregon plan for health care for the poor. This plan involves a ranking of treatments by a measure of the amount of improvement in health *divided by the cost of the treatment.* 175 F.3d at 1039; EPA App. 16a-17a. In other words, the principal model suggested by the lower court for EPA to follow in developing an "intelligible principle" for the ozone standard is itself a cost-benefit analysis.

Another alternative suggested by the lower court is for EPA to "report to Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice." *Id.*; EPA App. 18a. And indeed, if *Lead Industries* is correct, returning to Congress may be EPA's only legal alternative.

The interpretation of Section 109(b) of the Act suggested by EPA and supported by the lower court logically requires only one of two equally untenable results. The first is that EPA has no discretion and must set the standard for a non-threshold pollutant at zero. The second is that because no factor other than direct health effects can be considered, EPA has complete discretion to select any standard for a non-threshold pollutant. 175 F.3d at 1038; EPA App. 14a.

The first possible result of the lower court's interpretation of Section 109 for a non-threshold pollutant is both untenable and inconsistent with Congress's intent. If health is truly the only factor to be considered, then the only way to prevent any risk of direct adverse health effects is to set the standard at zero. "Thus the only concentration for ozone and PM that is utterly risk-free, in the sense of direct health impacts, is zero." 175 F. 3d at 1034; EPA App. 5a.

Of course, consideration of health as a criterion does not necessarily mean that the concentration chosen should be "utterly risk free." But "for EPA to pick any non-zero level it must explain the degree of imperfection permitted." 175 F.3d at 1034; EPA App. 6a. All of EPA's stated criteria are vague references to "the nature and severity" of health effects, "the size of the sensitive populations at risk," and the "kind and degree of uncertainties that must be addressed." 175 F.3d at 1034-35; EPA App. 6a-7a, citing Ozone Final Rule, 62 *Fed. Reg.* at 38,883/2.

Aside from their vagueness, these factors do not provide a principled method for drawing a line identifying a level of air quality that is "requisite" to protect the "public health." How many deaths or adverse affects in the "sensitive population" is EPA willing to tolerate in the name of "public health"? How severe must a "health effect" be for EPA to consider it in setting a NAAQS designed to protect the "public health"? If direct health risks alone are to be considered, there simply is no principled way to draw a line, below which the effects are acceptable from a "public health" standpoint, and above which they are not. As a consequence, if factors other than direct health effects may not be considered, it is impossible to articulate or discern an intelligible principle for establishing a standard, at any level other than zero, for a non-threshold pollutant.

EPA's NAAQS determinations, as with all agency determinations, are subject to judicial review under the standard articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). CAA §307(b)(1), (d)(1), (s); 42 U.S.C. 7607(b)(1), (d)(1), (s); EPA App. 120a-21a. Under a non-zero-risk regime with direct health risk as the only criterion, EPA must pull a number out of thin air in setting a standard for ozone. As there is complete discretion in setting a standard under this theory, it is impossible for EPA to commit an abuse of discretion. This renders the standard

essentially unreviewable by the courts. Although the *Chevron* analysis is deferential to administrative agencies, it does not allow the agency complete and unreviewable discretion in its interpretation of acts of Congress.

The dilemma produced by *Lead Industries* and EPA's standardless assertion of authority is what led the D.C. Circuit to invoke the nondelegation doctrine. As the ATA conditional cross-petitioners pointed out, the D.C. Circuit was bound by the *Lead Industries* precedent to preclude EPA's consideration of cost under Section 109, and the only alternative is permitting EPA a boundless (and therefore unconstitutional) discretion. This Court is not bound by *Lead Industries*, and can resolve the case without reaching the nondelegation doctrine, by construing Section 109 to permit consideration of other factors.

B. This Court Should Resolve The Impasse Created For EPA And The States By The District of Columbia Circuit's Holding That EPA Cannot Consider Costs When Setting A NAAQS.

The lower court's decision also places the States in a potentially impossible position. Under the Act, after EPA sets a standard for a particular pollutant, each State is required to develop a state implementation plan ("SIP") for that pollutant. CAA §110; 42 U.S.C. 7410. Indeed, the State is primarily responsible for enforcing a standard. CAA §107; 42 U.S.C. 7407. EPA is required to gather and issue to the States:

> information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology.

CAA §108(b); 42 U.S.C. 7408(b). In other words, EPA is to gather and provide data to the States on the economic and technological costs of implementing the standard. The lower court has held that this provision of Section 108 does not require or allow EPA to consider costs and benefits in setting a standard. 175 F.3d at 1041; EPA App. 20a.

If this interpretation is correct, then EPA is free to set the standard for a particular pollutant without considering its cost and EPA could set a standard that in practical terms, is impossible to implement because of its costs. The States would be left "holding the bag": required to attain the standard by a specific deadline through their implementation plans, while considering costs of implementation, but faced with an arbitrarily-set and non-cost-effective standard.

This Court's review is necessary to alleviate the potential for the States to be placed in an untenable position under this regime--a regime that forces States to impose controls to abate theoretical health risks without promoting the "public health" of its population.

C. This Court Should Reconcile The Conflicting Holdings By The District Of Columbia Circuit Regarding An Administrative Agency's Authority To Consider Factors Not Mentioned Explicitly In The Enabling Legislation.

Under Section 109(b) of the Act, the EPA is to set air standards "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. 7409(b). Once a standard is set, the EPA must review it periodically, and revise it as appropriate under Sections 108 and 109(b).

The D.C. Circuit first considered the scope of EPA's authority with regard to the language of Section 109(b) in *Lead Industries*. In *Lead Industries*, the court reviewed the contention by petitioners in that case that the EPA was *required* by the language of the statute to consider economic and technological feasibility in setting air quality standards for lead. 647 F.2d 1148. However, the court went beyond what was necessary to decide that issue, and held that not only was EPA not *required* to consider economic and technological factors, but that it was *precluded* from doing so. 647 F.2d 1148.

The erroneous dictum has been cited on several occasions since *Lead Industries*, and indeed expanded since *Lead Industries*, to preclude EPA from using a number of factors in determining a standard. For instance, the D.C. Circuit held that in setting the standard for particulate matter, the EPA was precluded from considering the health consequences of unemployment. *National Resources Defense Council v. U.S. EPA*, 902 F.2d 962, 972-73 (D.C. Cir. 1990). In addition, the D.C. Circuit held that EPA could not consider attainability and cost justifications for ozone standards. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1184-85 (D.C. Cir. 1981). And in dicta, the D.C. Circuit stated that §109 does "not allow consideration of technological or economic feasibility." *Vinyl Chloride*, 824 F.2d at 1158-59.

The *Lead Industries* rationale was that where Congress did not expressly and specifically provide for consideration of cost or other factors, an agency was forbidden from considering it. 647 F.2d at 1148. To be sure, the courts have correctly held that where statutory language articulates the factors relevant to an agency's decision, the agency may not base its decision on other, irrelevant factors. For example, in *Union Electric Co. v. U.S. EPA*, 427 U.S. 246 (1976), the Court found that a provision enumerating

eight criteria for consideration did not authorize consideration of other criteria. *Id.* at 257. Similarly, in *American Petroleum Institute v. U.S. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995), the lower court struck down EPA's decision to include the goal of ethanol market protection in its promulgation of regulations under Section 211 of the Clean Air Act, 42 U.S.C. 7545, a goal that could "possibly make air quality worse." According to the court, considering this goal as the basis for the regulation did not square with the statutory mandate to adopt performance standards that reduce pollution. And in *Ethyl Corp. v. U.S. EPA*, 51 F.3d 1053 (D.C. Cir. 1995), the D.C. Circuit held that EPA's decision to deny a waiver based on health considerations (rather than the statutorily-required criterion of whether an additive caused or contributed to the failure of an emission control device) was impermissible. *See also NOx SIP call*, 2000 U.S. App. LEXIS 3209, *93 (Sentelle, J., dissenting).

In contrast, broad statutory language directing EPA to adopt rules that protect the "public health" with an "adequate margin of safety," and directing EPA to revise standards as may be "appropriate," does not preclude consideration of any factor. Thus, another line of D.C. Circuit cases holds that an agency can consider costs if not expressly precluded from doing so by statutory language. For instance, in *Vinyl Chloride*, 824 F.2d at 1155, 1163, the D.C. Circuit held that Section 112, 42 U.S.C. 7412, which requires EPA to set an air quality standard for hazardous pollutants with an "ample margin of safety" to protect the public health, did not preclude a consideration of costs. And in *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 622-23 (D.C. Cir. 1998), the D.C. Circuit allowed EPA to consider the effects of a proposed rule on the price and supply of gasoline because there was nothing in the text or structure of the statute to preclude it. In *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998), the FAA was permitted to consider costs in its plan for

"substantial restoration of the natural quiet," even though costs were not mentioned in the statute. And in *National Resources Defense Council v. U.S. EPA*, 937 F.2d 641, 645 (D.C. Cir. 1991), the D.C. Circuit allowed EPA to use a cost-benefit analysis in determining whether fugitive dust from coal mines should count in identifying "major" contributors to "significant deterioration" under Sections 160 *et seq.*, despite the lack of statutory language mentioning costs. As the D.C. Circuit observed only this month in *NOx SIP call*, 2000 U.S. App. LEXIS 3209 at *36-40, "[t]hese cases are unexceptional in their general view that preclusion of cost consideration requires a rather express congressional direction."[3]

Therefore, in contradiction to the rationale in the *Lead Industries* line of cases, the rationale in *Vinyl Chloride* and similar cases is that where Congress does not enact statutory language that precludes it, and where Congress in fact enacts statutory language (*e.g.*, "ample margin of safety") that opens the door to cost considerations, an administrative agency can consider cost. And where an agency is confronted with cost arguments, and it has discretion to consider them, it cannot lawfully ignore them. Indeed, there is no principled reason why Section 109(b) cannot be analyzed under *Vinyl Chloride* and similar cases, rather than under the erroneous *Lead Industries* test. Several of the cited cases involve similar statutory structures: "a mandate directed to some environmental benefit," "phrased in general quantitative terms," "and contain[ing] not a word alluding to non-health trade-offs." Section 109 fits comfortably into this structure. The language at issue in Section 109 is as follows:

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[3] Respondent States were among those who challenged EPA's *NOx SIP call* rule by asserting, among other claims, that costs were inappropriately considered in the determination of significant contribution.

> National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety*, are requisite to protect the public health.

42 U.S.C. 7409(b)(1)(emphasis added); EPA App. 111a. The examples of mandates "phrased in general quantitative terms" given by the court in *NOx SIP call* include "ample margin of safety," "substantial restoration" and "major." The mandate in Section 109(b), "an adequate margin of safety," is virtually identical to "ample margin of safety" cited by the D.C. Circuit in *NOx SIP call* and analyzed by that court in *Vinyl Chloride*. Like *Vinyl Chloride* and similar cases, Section 109(b) itself does not, on its face, preclude consideration of factors other than health. Therefore, under the rationale of *Vinyl Chloride* and similar cases, Section 109(b) allows EPA to consider cost in setting a standard, because Congress has not expressly forbidden it, while under the rationale of *Lead Industries* and progeny, Section 109(b) precludes EPA from considering cost in setting a standard because Congress does not expressly allow it.

Lead Industries simply cannot be reconciled with the *Vinyl Chloride* line of cases regarding the authority of an administrative agency to consider a factor not expressly mentioned in the statutory language. Given the D.C. Circuit's reluctance to overturn *Lead Industries*, or otherwise reconcile its own jurisprudence, and the potential for avoiding the nondelegation issue, this conflict should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the Conditional Cross-Petitions if it grants certiorari on any form of the first question presented in EPA's petition.

Respectfully submitted,

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In The Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF IN RESPONSE FOR STATES OF OHIO, MICHIGAN AND WEST VIRGINIA

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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded to the U.S. Environmental Protection Agency (EPA or the Agency) revised National Ambient Air Quality Standards (NAAQS) promulgated under Section 109 of the Clean Air Act, 42 U.S.C. 7409, for that Agency to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the court of appeals properly construed the scope of the Agency's discretion in defining those criteria.

2. Whether the lower court had jurisdiction to review a final rule promulgated by EPA under the Clean Air Act, which rule resolved the question of the Agency's authority to replace the congressional "Subpart 2" ozone reduction program in certain areas of the country with a different program of the Agency's own creation.

3. Whether the lower court erred in its unanimous rejection of EPA's final rule regarding the manner in which the Clean Air Act provides for attainment of national ozone standards.

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STATEMENT OF THE CASE

Respondent States of Ohio, Michigan, and West Virginia submit this brief in response to the petitions by the United States Environmental Protection Agency (EPA or the Agency) and other parties for a writ of certiorari to review the decision of the District of Columbia Circuit in *American Trucking Associations, Inc. v. United States Environmental Protection Agency*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999), EPA App. at 1a. The case before the lower court arose from an EPA rulemaking regarding two pollutants regulated under the Clean Air Act – particulate matter (PM) and ozone. The Respondent States support the Statement of the Case presented in the response briefs filed by the American Trucking Associations, Inc., *et al.* (collectively, ATA) and the Appalachian Power Company, *et al.* (collectively, the CAA Industry Respondents), which discuss both PM and ozone. In this response, the Respondent States focus on just one aspect of the rulemaking – ozone.

Prior to amendment in 1990, the Clean Air Act, 42 U.S.C. 7401, *et seq.* (the Act, cited as CAA), applied an identical statutory program for six specified pollutants, *i.e.*, pollutants for which EPA issued criteria for meeting air quality. Section 109 of the Act, 42 U.S.C. 7409, required EPA to establish a national standard (a National Ambient Air Quality Standard or NAAQS) for each of these pollutants. Once EPA set the national standards, Section 110 of the Act, 42 U.S.C. 7410, required each State to develop a plan (a State Implementation Plan or SIP) to implement its own mix of air pollution control strategies to meet each standard. Each implementation plan had to provide for "attainment" of the national standard within five years, with the possibility of a five-year extension, from the time of the 1977 amendments.

By 1990, Congress recognized that its historic approach to compliance – simply commanding that all States reach attainment of each standard by a date certain – had

failed with regard to ozone. In the face of this failure, Congress established a new approach and a unique program for ozone. In Subpart 2 of Part D of the amended Act, 42 U.S.C. 7511-7511f (CAA Indus. App. at 2a-64a), Congress created an elaborate, 20-year plan for achieving national compliance with the ozone standard, and specified measures that would ensure continued compliance in the future. Integral to that program is the one-hour standard, which Congress codified in Subpart 2.

On July 18, 1997, EPA changed Congress's plan for ozone attainment. On that date, EPA gave final notice of its revision of the national standard for ozone, changing the standard from the one-hour limit of 0.12 ppm set by Congress, to an eight-hour limit of 0.08 ppm.[1] The Respondent States petitioned the District of Columbia Circuit to review that revision. On May 14, 1999, the D.C. Circuit remanded the revised standards for PM and ozone to EPA for further rulemaking. As to Subpart 2 and Congress's plan for regulating ozone, the lower court rejected EPA's conclusion that the Agency had the authority to rewrite the congressional plan. The court relied on Congress's directive that Subpart 2 must apply "by operation of law" to "[e]ach area designated nonattainment for ozone" under the Act. 175 F.3d at 1048; EPA App. at 38a. On this basis, the court held that EPA could enforce a revised ozone standard only "under Subpart 2," 175 F.3d at 1050; EPA App. at 43a, and that the Act precluded EPA "from requiring areas to comply either more quickly or with a more stringent NAAQS." 175 F.3d at 1049; EPA App. at 40a.

EPA's rulemaking and the questions it raises are of substantial importance to the States. However, as described

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[1] The response briefs of ATA and the CAA Industry Respondents describe these limits in detail.

fully below, these questions arise here within the framework of well-established principles of judicial review and rules of statutory construction. The Court need not, therefore, revisit these principles in the context of this case.

POSITION ON GRANTING REVIEW OF QUESTION ONE OF EPA'S PETITION

The States of Michigan and West Virginia adopt the reasoning of the CAA Industry Respondents and ATA for the purpose of denying review of Question One of EPA's petition of certiorari. That question asks whether the lower court properly remanded the revised rules to EPA in order for EPA to exercise the discretion delegated to it by Congress to develop intelligible criteria for risk management decisions, and whether the lower court properly construed the scope of the Agency's discretion in defining those criteria. The State of Ohio does not oppose the Court's grant of certiorari on the "delegation" question.

If, however, the Court grants review of the delegation question, all three Respondent States urge the Court to reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents. In particular, as explained in the Brief of Respondent States in Support of the ATA and CAA Industry Cross-Petitions, the Court may avoid the delegation question altogether if it finds that EPA may consider cost in any revision of a standard under Section 109 of the Act.

REASONS FOR DENYING REVIEW OF QUESTIONS TWO AND THREE OF EPA'S PETITION

Questions Two and Three of EPA's petition ask this Court to review the lower court's decision that EPA may only enforce any revised ozone standard in conformity with Subpart 2 of Part D of the Act. EPA App. at 81a. EPA first

asserts that the lower court did not have jurisdiction to review EPA's decision. EPA Pet. at 19-25. Alternatively, EPA presents to this Court the same arguments EPA made to the lower court on the merits of the question, *i.e.*, the same arguments the lower court rejected in its initial decision and on rehearing. EPA Pet. at 25-29. For the reasons detailed below, neither of these questions warrants additional review by this Court.

A. The Court Should Deny Certiorari on Question Two of EPA's Petition, which Asks for Review of the Lower Court's Jurisdiction to Consider a Final Agency Action.

In its petition for rehearing before the lower court, EPA argued for the first time that the Agency's decision to change the ozone standard was not a final agency action ripe for review. Instead, EPA argues, the court's jurisdiction ended with its review of whether "the statutory provisions at issue precluded EPA from promulgating the revised standard." EPA Pet. at 21. EPA bases this argument on two grounds: first, that the lower court's test for finality is "inconsistent with the test applied by this Court and other courts of appeals;" and, second, that the action is not ripe for review because it "deprived EPA of the opportunity to develop fully its interpretation and to reconcile any tensions that may arise in the future respecting implementation of the revised NAAQS." EPA Pet. at 10.

EPA's arguments ignore the plain language of the Act, which explicitly permitted review in this case, misrepresent the lower court's express findings, which were based on well-established principles of judicial review, and contradict the position EPA took in the final rulemaking that gave rise to this case. It is unnecessary, therefore, for this Court to grant EPA's petition on this question and to revisit established precedent in the context of this case.

1. *The Clean Air Act expressly authorizes review of EPA's action.* Section 307 of the Act provides that "action of the Administrator in promulgating any [NAAQS], . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia." CAA §307(b)(1); 42 U.S.C. 7607(b)(1). That petition for review must be filed within 60 days of the Federal Register notice of the promulgation, and that action may not be judicially challenged thereafter. *Id.*

As EPA points out, Section 307, 42 U.S.C. 7607, also authorizes review of a number of final actions that are locally or regionally appealable in the local circuit court of appeals, including the Agency's approval or promulgation of a state implementation plan under Section 110 of the Act, 42 U.S.C. 7410. That additional authorization, however, in no way limits review, pursuant to Section 307, of EPA's promulgation of rules *at the time of promulgation.* Nor does the case here present a request, express or otherwise, to review "classification challenges." EPA Pet. at 20. Rather, it is a challenge to a final rule governing the manner in which States are to achieve attainment of national ozone standards, and, thus, a challenge specifically provided for under Section 307's scheme for prompt review of rules and standards *upon promulgation.*

Where, as here, the Act expressly provides for the review granted by the lower court, this Court need not grant certiorari to consider this question.

2. *The lower court's decision on finality is consistent with the test applied by this Court and other courts of appeals.* EPA has correctly noted that, in this Court's view, two conditions must be satisfied for agency action to be "final." *Bennett v. Spear*, 520 U.S. 154 (1997). First, "the

action must mark the 'consummation' of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78, citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). Second, "the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178, citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Contrary to EPA's suggestion, the lower court applied this well-established test and correctly determined that both elements are satisfied here.

First, EPA's interpretation of Subpart 2 marks the "consummation" of its decisionmaking process. In the preamble to the final rule, EPA stated:

> 4. *Final decision on the primary standard.* After carefully considering the information presented in the Criteria Document and the Staff Paper, the advice and recommendations of [the Clean Air Scientific Advisory Committee], public comments received on the proposal, and for the reasons discussed above, the Administrator is replacing the existing 1-hour, 0.12 ppm primary standard with a new 8-hour, 0.08 ppm primary standard. The new 8-hour standard will become effective September 16, 1997.

62 Fed. Reg. 38,873 (July 18, 1997)(emphasis in original). EPA explained that this "final decision" represented a change from its original intention to delay revocation of the 1-hour standard until after it had approved state plans for implementing the new standard. *Id.* EPA clarified that under this final decision "the provisions of subpart 2 . . . will continue to apply for so long as an area is not attaining the 1-

hour standard. Once an area attains that standard . . . the provisions of subpart 1 . . . would apply to the implementation of the new 8-hour [ozone] standards." *Id.* EPA then codified this decision in Section 50.9(b) of the final rule, from which the petitions below sought review. That section provides, "The 1-hour standard set forth in this section will no longer apply to an area once EPA determines that the area has air quality meeting the 1-hour standard." 40 C.F.R. 50.9(b); Mass. and N.J. App. at 113.

There is nothing tentative about this final decision. As the lower court found, it is "unambiguous and devoid of any suggestion that it might be subject to subsequent revision." 195 F.3d at 8 (EPA App. at 78a), quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990).

Second, as the lower court found, EPA's promulgation of a revised ozone NAAQS triggered a number of "obligations" and "legal consequences." As EPA acknowledged in the preamble to the final rule, the 8-hour standard becomes immediately effective to those areas designated "attainment" under the current standard.[2] Section 107 of the Act requires the Governor of each State, within one year after EPA's promulgation of a revised standard, to submit to EPA a list of designations for all areas in the State. CAA §107(d); 42 U.S.C. 7407(d). Under EPA's theory of the statute, this list of designations then triggers other actions by EPA to promulgate the designations, CAA §107(d)(1)(B); 42 U.S.C. 7407(d)(1)(B), to classify the areas, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), and to apply an attainment date, CAA §172(a)(1); 42 U.S.C. 7502(a)(1), then by the States to implement a plan for meeting the revised

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[2] Reliance on preamble statements to explain final legislative rules is appropriate. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 157-58 & n.13 (1982).

requirements, CAA §172(b); 42 U.S.C. 7502(b). EPA's suggestion that finality does not occur until after it designates areas and the States implement plans ignores the burden on the States that flows from EPA's theory of the statute as reflected in the final rule.

The lower court's recognition of the finality of EPA's decision and the immediate obligations that flow from it is consistent not only with this Court's review in *Bennett v. Spear*, but also with the analysis of such questions invariably applied by the lower court and other courts of appeals. *See, e.g., Mobil Exploration & Producing U.S., Inc. v. Dept. of Interior*, 180 F.3d 1192, 1196-1200 (10th Cir. 1999); *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533, 540-41 (D.C. Cir. 1999); *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998); *Ciba-Geigy Corp. v. USEPA*, 801 F.2d 430, 436-37 (D.C. Cir. 1986).

In short, there is no disagreement between this Court and circuit courts, including the D.C. Circuit, as to the proper inquiries to determine finality, nor even among the parties in this case. EPA's real contention is that the lower court incorrectly applied the law to the facts before it – a contention unworthy of this Court's review.

3. *EPA's action is ripe for review.* In determining that EPA's action was ripe for review, the lower court applied the well-established guidelines of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). As this Court has often stated, the question of ripeness turns on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Id.* at 149. Here, the lower court determined that the case was fit for review because it presented "a pure question of law, the resolution of which would not benefit from a more concrete setting." 195 F.3d at 9, EPA App. at 79a.

EPA's suggestion to this Court that it should have had more time to further develop its interpretation and to "work through the various implementation provisions" could apply to any rulemaking. *See* EPA Pet. at 25. EPA could always develop its original interpretation and, through various implementation efforts, change its approach. Where, as here, the question is one of law, judicial review need not await further development, even if additional interpretation would prove useful. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 201-02 (1983).

Nor must judicial review await a more concrete injury to potential petitioners. Where, as here, "decisions to be made now or in the short future may be affected" by a court's decision, review is proper. *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974).

As with its decision on finality, the lower court applied well-established principles of jurisprudence to determine that the issues before it were fit for review and that delay would cause further hardship to the parties. It is unnecessary, therefore, for this Court to revisit these established principles in the context of this case.

B. The Court Should Deny Certiorari on Question Three of EPA's Petition, which Seeks Re-argument of the Case Below.

As an alternative to its argument that the lower court lacked jurisdiction to review the Agency's action, EPA asserts that the lower court did not decide the merits of the case correctly. As with its decisions on finality and ripeness, however, the lower court decided the merits of the Subpart 2 implementation question within the framework of well-established principles of statutory construction. The lower

court determined that EPA's decision was contrary to Congress's intent, as expressed in the plain language of the 1990 amendments to the Clean Air Act. Re-argument of this question is, therefore, unworthy of review by this Court.

1. *The interlocutory nature of the lower court's decision counsels against granting certiorari on Question Three presented by EPA.* In their briefs in response to the petitions for certiorari, ATA and the CAA Industry Respondents have fully explained the interlocutory nature of the lower court's decision, which requires additional rulemaking. *See* CAA Industry Respondents Brief in Response at 29-30; ATA Brief in Response at 16-18. The Respondent States support the arguments presented in those briefs.

2. *The lower court correctly decided that EPA may only implement any revised ozone NAAQS in conformity with Subpart 2 of Part D of the Act.* In the case below, the Respondent States argued that Subpart 2 codified the one-hour, 0.12 ppm ozone standard and, therefore, only Congress can promulgate a revised standard for ozone. The Respondent States based their argument on the explicit language of Section 181(a), 42 U.S.C. 7511(a), which applies the Subpart 2 program "by operation of law" to "[e]ach area designated nonattainment for ozone" under Section 107(d) of the Act, 42 U.S.C. 7407(d). The lower court rejected that argument, finding that EPA has authority to revise the ozone standard and to designate areas as nonattainment under Subpart 1 of Part D, which applies to all other nonattainment areas.

The court agreed, however, that EPA does not have authority to implement a more stringent ozone standard in conflict with the Subpart 2 program, which Congress established as the exclusive program for implementing the ozone standard. On rehearing, the court confirmed that "EPA can enforce a revised primary ozone NAAQS only in

conformity with Subpart 2." 195 F.3d at 10, EPA App. at 81a. The court was correct in its analysis that, even if EPA retains the authority to revise the ozone NAAQS and to designate areas not meeting that standard as nonattainment, EPA may only implement that standard using the classifications and attainment dates set by Congress in Subpart 2.

The lower court based its findings, as with its finality and ripeness findings, upon straightforward statutory construction. As *Chevron* instructs, if Congress has spoken on the "precise question at issue," then a court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984). Congress has clearly spoken here.

Congress enacted Subpart 2 as a comprehensive scheme to address ozone nonattainment. Specifically, as EPA acknowledges, Congress enacted Subpart 2 because the existing controls imposed under Subpart 1, which applies to other nonattainment areas, had failed to bring areas into attainment with the one-hour, 0.12 ppm standard. *See* H.R. Rep. No. 101-490 at 145-50, reprinted in II 1990 Legislative History at 3169-74. Rather than continue to treat all ozone nonattainment areas alike, Congress allowed the various areas between three and 20 years to attain the ozone standard, depending upon the extent of the area's ozone problem. *See id.* at 146-47. Congress provided additional measures that would apply in areas that failed to achieve attainment in 20 years, or that relapsed into nonattainment in the future.

The lower court held that the detailed and comprehensive nature of the Subpart 2 program manifests Congress's intent to require EPA to implement a revised ozone standard only in conformity with Subpart 2. Anything less would conflict with Congress's plan.

First, as noted above, Congress avoided the "one size fits all" approach of Subpart 1 and provided varying deadlines for attainment. In Subpart 2, Congress provided that if an area does not meet the standard on time, the area will "bump up" to the next classification, which includes a new attainment date. If an area does not achieve compliance by the final deadline for the most polluted category, sources within the area are then subject to fees for each ton of pollutant in excess of a baseline amount. In this way, Congress acknowledged that attainment was going to be extremely difficult, if not impossible, to achieve in some areas, and crafted a plan with strong incentives, specific programs, varying deadlines, and remedial measures for areas that failed to meet the applicable deadlines.

Second, Congress mandated specific controls for each category of nonattainment and directed EPA to impose certain requirements for reducing ozone. These specific requirements are a marked departure from the historic approach, which allowed States great latitude in determining what mix of controls is most appropriate to a certain region. Again, these specific requirements were included because Congress saw that the old model could not work for ozone. *See* I Legislative History of the Clean Air Act Amendments of 1990 at 1236 (statement of Rep. Fields)("We have placed what we hope are more realistic deadlines in the new law. We have not, however, simply continued to tell the states to do a plan to clean their air. That did not work. We have imposed some very stringent requirements on nonattainment areas which will in turn have to impose such requirements on industry in those areas").

Third, Congress created several mechanisms by which Subpart 2 was to control ozone attainment for the entire 20-year period and beyond. In conjunction with the bump-up provisions, in Section 182, 42 U.S.C. 7511a, Congress established reasonable further progress

requirements to ensure that States are, in fact, moving towards their goal. Congress also required areas that are "serious," "severe," or "extreme" nonattainment to include "contingency plans" with specific measures that would be implemented if an area does not meet a milestone. CAA §182(c)(9), (d), and (e); 42 U.S.C. 7511a(c)(9), (d), and (e). And Congress expressly mandated that Subpart 2 would continue to apply even if attainment were achieved. CAA §181(b); 42 U.S.C. 7511(b). As a whole, these provisions demonstrate that Congress anticipated that ensuring attainment and maintenance of the ozone NAAQS would be a continuing challenge and, more importantly, that Congress created a statutory structure within Subpart 2 to meet that challenge.

Because Congress has spoken to the "precise question" of ozone attainment under the Clean Air Act, the lower court was correct in its finding that, if EPA has the authority to revise the ozone NAAQS at all, then it may implement that standard only in conformity with Subpart 2. Any further re-argument of these issues within this straightforward statutory framework is unworthy of this Court's review.

3. *The lower court's decision restores certainty for the States.* The States of Massachusetts and New Jersey petition for certiorari on the merits of the Subpart 2 question, in part because the situation resulting from the lower court's decision "creates enormous uncertainty for the states as regulators." Mass. and N.J. Pet. at 29. On the contrary, the lower court's decision *restores* the certainty that existed prior to EPA's attempted interference with the program for ozone attainment that has been in place since 1990 — Congress's program under Subpart 2.

In fact, EPA's action would have created regulatory confusion in and among States because it created two

national standards instead of one. Many States, including both Michigan and Ohio, would have had different standards applicable in different parts of the State, as some portions of each would still be subject to the one-hour standard and some would not. *See* 62 Fed. Reg. 60,318, 60,323 (July 18, 1997); 63 Fed. Reg. 2,726, 2,762, 2,778 (January 16, 1998). The same would hold true among and between States, thus making the quantification of interstate pollution, the Petitioner States' primary concern, more difficult.

But, most fundamentally, implementation of a national ozone standard in a manner not in conformity with Subpart 2 would force the States to return to the failed compliance scheme that Congress abandoned when it created Subpart 2. Such a resurrection of the historic dilemma the States had in creating a plan to comply with an unachievable standard by a specific timeframe would not only create uncertainty, but would undoubtedly prove to be unsuccessful once again.

CONCLUSION

For these reasons, the Court should deny certiorari on Questions Two and Three presented by EPA. If the Court grants certiorari on Question One of EPA's petition, the "delegation" issue, then the Court should reformulate that question in a manner consistent with the conditional cross-petitions filed by ATA and the CAA Industry Respondents.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN RESPONSE FOR RESPONDENTS NATIONAL STONE ASSOCIATION AND KENNECOTT HOLDINGS CORPORATION, *ET AL.*

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PARTIES TO THE PROCEEDINGS

This Brief is filed on behalf of Respondents National Stone Association, Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company. These Respondents were Petitioners in the consolidated cases addressed by the Petitions for a Writ of Certiorari to which this Brief responds, *American Trucking Ass'ns, Inc. v. United States Environmental Protection Agency*, D.C. Cir. No. 97-1440 (and consolidated cases). A complete list of the other parties to the proceedings below is provided in the Brief in Response for the Respondents Appalachian Power Co., et al.

RULE 29.6 DISCLOSURE STATEMENT

1. Respondent National Stone Association (NSA) is a national trade association representing the interests and concerns of the aggregates industry. NSA has not issued shares or debt securities to the public. NSA includes over 700 member companies, which account for approximately 90% of the annual U.S. production of crushed stone and approximately 70% of U.S. sand and gravel production.

2. Respondents Kennecott Holdings Corporation, Kennecott Energy and Coal Company and Kennecott Services Company have not issued shares or debt securities to the public.

3. Rio Tinto plc, the indirect parent of the Kennecott companies listed above, is a company incorporated under the laws of the United Kingdom, whose shares are publicly traded in the United States in the form of American Depository Receipts. The principal market for Rio Tinto PLC ordinary shares is the London Stock Exchange, with ordinary shares also listed on the Amsterdam, Brussels, Frankfurt, Paris and Swiss Exchanges. Rio Tinto's principal business is mining.

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INTRODUCTION

This Brief responds to the various Petitions for a Writ of Certiorari on portions of the Court of Appeals' decision in *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027, *modified*, 195 F.3d 4 (D.C. Cir. 1999). These Respondents are interested primarily in the "nondelegation" decision below with respect to the national ambient air quality standards for fine particulate matter (PM-2.5). They concur generally in the Brief filed by Respondents Appalachian Power Co., et al., and join those Respondents in urging the Court to deny certiorari on the "nondelegation" issue and others presented in this case. The purpose of this Brief is to provide the Court with additional legal and factual support for the decision of the Court of Appeals with respect to the fine particle standards.[1]

I. THE FINE PARTICLE RECORD AMPLY SUPPORTS THE "NONDELEGATION" HOLDING

In EPA's Petition, the brief discussions of the basis for the fine particle standards focus exclusively on the agency's decision that the prior standards did not provide adequate protection. EPA Pet. 5, 11. Even that decision was subject to considerable scientific uncertainty, as EPA discussed in the preamble to the final rules.[2] Beyond that,

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[1] In the decision on rehearing below, the Court of Appeals indicated that it would defer to EPA's response to the "nondelegation" holding under this Court's opinion in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). EPA App. 75a-76a. Respondents note this Court's recent confirmation that under *Chevron*, the first inquiry is whether Congress has spoken to the question at issue; if so, the court must effect the unambiguous intent of Congress. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. —— (2000). As discussed below, Congress has expressed its intent unambiguously in this case; EPA simply failed to follow it.

[2] *See* 62 Fed. Reg. 38,655-657 (1997). The agency's scientific advisors found that the relevant studies "provide ample reason to be concerned," but also urged that the studies "should be interpreted cautiously" as a result of the various uncertainties (62 Fed.

however, the effect of the scientific uncertainties was greatly magnified in the subsequent decision as to the level at which the new standards would be set. At that point, it was simply not possible to choose the concentration levels based on the science alone. Faced with widespread scientific uncertainty, EPA not only failed to articulate an intelligible principle to govern its decision, but expressly rejected the principle that Congress intended to be applied.

EPA's discussion of the concentration levels for the fine particle standards is a remarkable combination of rejected options and conclusory explanations for the chosen approach.[3] In attempting to justify the chosen standards, EPA stated that the agency:

- sought "the requisite reduction of risk;"
- made "decisions on standard levels that would reduce risk sufficiently to protect public health with an adequate margin of safety;"
- adopted a "balanced view of the strengths and uncertainties of the scientific information that reflects the intermediate approach;"
- "accurately reflected the bases for divergent views;"
- rejected fine particle protection equivalent to the prior PM-10 protection;

Reg. 38,656, col. 3). Accordingly, the Administration delayed implementation until after the first five-year review of the standards, in the hope that pending research would provide some answers. *See* 62 Fed. Reg. 38,421 (1997) (Presidential Memorandum). Congress ultimately ratified the President's decision. *See* Pub. L. 105-178, 112 Stat. 463 (1990), ICP App. 66a. Thus, EPA's assertion that the decision below "unnecessarily prolongs the exposure of millions of Americans to unhealthy pollutant levels" seems somewhat disingenuous. EPA Pet. 11.

[3] The following bullets and quotations are taken from the agency's discussion of the concentration levels at 62 Fed. Reg. 38,674-677 (1997).

- rejected "uncertain ratios" to the prior PM-10 standards;
- opted for "appropriately protective" standards;
- acknowledged great "scientific uncertainties" in the available health studies;
- considered the combined effects of the annual and 24-hour standards, the cumulative scientific uncertainties, the levels recommended by EPA staff and the science advisors, and public comments.

Yet nowhere, throughout this entire lengthy and complex explanation, is there *any* discussion whatsoever of the level of "risk reduction" that is "requisite," the level of protection that is "appropriate" or the criteria to be used in making these decisions in the face of extremely uncertain health studies.

There was no consensus among the agency's science advisors on these questions, given "the many unanswered questions and uncertainties . . ."[4] The scientific data gaps also were demonstrated clearly in the agency's unsuccessful attempts to prepare a reliable quantitative risk assessment for the standards. When entered into various risk assessment models, the data available from the underlying health studies were simply not sufficient to support a robust and reasonably reliable estimate of the risk reduction—if any—that the new standards would provide.[5] As a computer data analyst might say, "garbage in, garbage

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[4] Letter from Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, to Hon. Carol M. Browner (June 18, 1996), PMJA 3167.

[5] For a detailed discussion of the uncertainties inherent in the risk assessment, see Abt Associates, "A Particulate Matter Risk Analysis for Philadelphia and Los Angeles," prepared for U.S. EPA, OAQPS, pp. 129-136 (July 3, 1996). EPA Docket No. A-95-54, R.Doc.II-A-11.

out." In the final analysis, EPA did not place "great weight" on the various risk assessments, concluding that they "include significant uncertainty and, therefore, should not be viewed as demonstrated health impacts." [6] Leaving no doubt as to the minimal role of risk assessment in EPA's decision, EPA's Opening Brief in the Court of Appeals stated:

> [T]he risk assessment was not a "central justification" of the PM-2.5 levels . . . Indeed, EPA cautioned against using the risk assessment in this case as a precise measure of risk due to the limitations and uncertainties in the current state of the evidence. Thus, the risk assessment was not "central" to EPA's quantitative task of selecting the PM-2.5 levels.[7]

Denied the essential tool of a reliable risk assessment, EPA simply gazed into its crystal ball and picked a number somewhere in between the various diverging views.

This is precisely the approach to ambient standards that Congress and the courts have sought to prevent. In amending the standard-setting provisions in the Clean Air Act in 1977, Congress intended for EPA to assess risk, but also cautioned:

> [o]n the other hand, the committee does not intend this language as a license for "crystal ball" speculation. The Administrator's judgment must of course, remain subject to restraints of reasoned decisionmaking.[8]

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[6] 63 Fed. Reg. 38,665 (col. 1), 38,656 (col. 2) (1997).

[7] Brief for Respondent United States Environmental Protection Agency at 75, *American Trucking Associations, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1440 and consolidated cases) (filed August 5, 1998).

[8] H.R. Rep. No. 294, 95th Cong., 1st Sess. 51 (1977) (hereinafter "1977 Houe Rept."). The approach adopted by the House Com-

As a check on EPA's authority to adopt standards in the face of scientific uncertainty, Congress required the agency to demonstrate that standards are necessary to protect against significant public health risks. The House Committee expressly endorsed the opinion in *Ethyl Corp. v. EPA*, 541 F.2d 1, 13 (D.C. Cir. 1976), which holds that EPA may set standards only when necessary to prevent "a significant risk of harm."[9] In several places, the House Report makes it clear that standards are to address only "significant risk," not *any* risk.[10]

Further, this Court has indicated that the inability to justify public health regulation through scientifically sound quantitative risk assessment poses serious constitutional problems. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) ("*Benzene*"), the Court rejected an OSHA attempt to establish a health standard for benzene without demonstrating that

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mittee eventually was accepted in conference and written into the Act. *See* H.R. Rep. 564, 95th Cong., 1st Sess. 184 (1977) (Conference Report); *see also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) (remanding sulfur oxides secondary standard "for the Administrator to . . . enlighten the court as to the basis on which he reached the . . . standard from the material in the Criteria"); *accord, NRDC v. EPA*, 902 F.2d 962, 968, 971 (D.C. Cir. 1990) (court obligated to "carefully review the record to ascertain that the agency has made a reasoned decision based on reasonable extrapolations from some reliable evidence"); *Lead Industries Association v. EPA*, 647 F.2d 1130, 1146-47 (D.C. Cir. 1980) (factual conclusions capable of being drawn from the evidence in the record must be supported by "substantial evidence in the record considered as a whole"; where scientific knowledge insufficient to permit fully informed factual determinations, court "will indeed scrutinize such judgments carefully" and EPA must provide a reasoned explanation "calculated to negate the dangers of arbitrariness and irrationality"); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1187 (D.C. Cir. 1981) (same).

[9] *See* 1977 House Rept. at 43.

[10] See, e.g., 1977 House Rept. at 43, 45, 46, 47, 48.

the standard was necessary to protect against "a significant risk of harm" (448 U.S at 645). The Court noted that in the absence of a clear statutory mandate, it is unreasonable to assume that Congress intended to grant OSHA the "unprecedented power over American industry" conferred by regulation in the absence of a requirement to demonstrate significant risk (*id.*) The court also explained that "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit" (448 U.S. at 645). The Court then stated:

> [i]f the Government was correct in arguing that neither [applicable statute] requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional under the Court's reasoning in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388. A construction of the statute that avoids this kind of open-ended grant should certainly be avoided (448 U.S. at 646).

This case presents precisely the same scenario. Key scientific uncertainties made it impossible to quantify potential risk sufficiently to characterize it as significant for purposes of choosing the fine particle concentration limits. As a result, EPA was forced to abandon the "intelligible principle" of regulation based on significant risk, resorting to an arbitrary selection of standards from among widely divergent scientific views. No criteria for choosing a standard in the face of this scientific uncertainty were articulated, nor was any other rational basis provided for the numbers that EPA picked. In a reaction similar to this Court's decision in *Benzene*, the Court of Appeals found EPA's approach so arbitrary as to render

the underlying delegation of legislative authority unconstitutional. The court's holding is amply supported by the fine particle record. It is also fully consistent with the governing statute and the relevant decisions of this Court, for reasons to which we now turn.

II. THE "NONDELEGATION" HOLDING IS SUPPORTED BY THE GOVERNING STATUTE AND THE DECISIONS OF THIS COURT

EPA argues that the decision of the Court of Appeals "would unjustifiably expand the role of the courts in reviewing agency action," and "would effectively supplant the concept that courts review agency determinations based on an arbitrary and capricious standard." EPA Pet. 9, 17. But these arguments focus on only one part of the applicable standard of review. Clean Air Act Section 307(d)(9) (42 U.S.C. § 7607(d)(9)), which governs judicial review in this case, provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be:
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) *contrary to constitutional right, power, privilege or immunity*;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
>
> (D) without observance of procedure required by law . . . (emphasis added).

Far from assuming an unjustifiably expanded role, the court was fulfilling exactly the role that Congress intended.[11] In the view of these Respondents, the rule-

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[11] In adopting the 1977 standard-setting amendments, Congress was careful "to provide for adequate judicial review of the reasonableness of the Administrator's judgment in assessing risks,"

making record would have supported a remand of the fine particle standards under any of at least the first three provisions of this standard. The fact that the court chose to base its holding on constitutional grounds simply underscores the extremely arbitrary nature of EPA's decision.

Nor is there any basis for EPA's assertions that the court's ruling conflicts with this Court's nondelegation decisions. As discussed above, the court's ruling is fully consistent with this Court's decision in *Benzene*.[12] Further, EPA's argument that the starting point for a nondelegation analysis should be the statutory language, purpose and history is precisely the point. EPA Pet. 12. As this Court has noted, agencies are to "derive meaningful content" from these factors, which provide "a veritable code of rules . . . for the [agency] to follow in giving effect to [the statute]. *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946). Judicial review "safeguards against statutory or constitutional excesses," and "all that can be required is that the [agency's] actions conform to the statutory language and policy" (329 U.S. at 106). But where—as here—the agency expressly rejects the "intelligible principle" provided by Congress to govern its decision, and fails to provide a reasonable explanation of how it applied the statute and the underlying policy to derive the standards it chose, the effect is to create an

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in the form of the judicial review provision in Section 307(d). 1977 House Rept. at 50. The same statutory language appears in the judicial review provision of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2) (1999). Indeed, the "arbitrary and capricious" standard itself finds its roots in the Due Process Clause. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934).

12 *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (citing *Benzene*) (cases since the Depression confined to "giving narrow interpretations to statutory delegations that might otherwise be thought to be unconstitutional").

unconstitutional delegation. That is all the Court of Appeals held in this case, and its holding is amply justified by the fine particle record and the applicable legal principles expressed by this Court.

CONCLUSION

Congress directed EPA to base ambient air quality standards on significant public health risks. This Court has held that in such cases, the inability to quantify potential risk sufficiently to characterize it as significant raises serious constitutional concerns under the "nondelegation" doctrine. Unable to quantify potential risk owing to severe scientific deficiencies, EPA chose to reject these principles and establish fine particle standards without articulating any other governing criterion. The Court of Appeals found EPA's approach so arbitrary as to effect an unconstitutional delegation of legislative authority. The court's decision is entirely consistent with the record in decisions of this Court. The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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Nos. 99-1257, 99-1263, 99-1265

IN THE
SUPREME COURT OF THE UNITED STATES

Carol. M. Browner, Administrator of the
United States Environmental Protection Agency, *et al.*,
Petitioners

v.

American Trucking Associations, Inc., *et al.*,
Respondents/Cross-Petitioners

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF FOR THE MANUFACTURERS ALLIANCE/MAPI INC. IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS AMERICAN TRUCKING ASSOCIATIONS, *ET AL.*

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For The District Of Columbia Circuit

AMICUS CURIAE BRIEF FOR THE MANUFACTURERS ALLIANCE/MAPI INC.[1]

INTEREST OF AMICUS CURIAE[2]

The Manufacturers Alliance/MAPI Inc. ("MAPI") is organized as a nonprofit research and educational institution, as defined in the Internal Revenue Code, 26 U.S.C. §501(c)(6), and is supported today by some 450 manufacturing companies. MAPI also operates the Institute for Technological Advancement, a nonprofit research and educational institution as defined under Section 501(c)(3) of the Internal Revenue Code. MAPI owes its existence in its present form to the Court's decision in *A.L.A. Schechter*

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[1] Pursuant to Supreme Court Rule 37.6, in addition to Counsel identified on the cover, Brian Mannix, MAPI's Director of Science and Technology Studies, participated in authoring this brief. No entity other than MAPI provided financial support for this brief.

[2] The consent of the parties to the filing of the *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

Poultry Corp. v. United States, 295 U.S. 495 (1935) ("*Schechter Poultry*").

MAPI was originally organized as the Machinery and Allied Products Institute, an "industry association" under the National Industrial Recovery Act of 1933 ("NIRA"), for the purpose of drafting a "code of fair competition" for corporations in SIC Code 35, Machinery and Allied Products. The economic philosophy underlying NIRA – that the nation suffered from excess investment in productive capacity and would benefit from government-imposed restraints on competition and on new capital investment – was anathema to manufacturers of machinery and equipment. NIRA's direct restrictions on the purchase of new machinery was particularly troubling to members of SIC Code 35.

Thus, far from embracing its role as a "co-delegatee" with the National Recovery Administration, MAPI's founders recoiled from the code-development tasks they were directed to undertake. From its origin, MAPI was charged by its members with developing public policy arguments in support of economic expansion, technological innovation, and productivity growth, and in opposition to detrimental government restraints on capital investment.

After the Court vacated NIRA in *Schechter Poultry*, MAPI turned its energies to its research and education mission, which continues today. The petition and cross-petitions now before the Court involve MAPI's longstanding interest in the nondelegation doctrine as well as its longstanding opposition to broad governmental restrictions on economic growth and technological innovation.

Of particular interest to MAPI members are the sorts of restrictions on new capital investment that are typically imposed under the Clean Air Act within areas designated as "nonattainment" with respect to the ozone and particulate matter National Ambient Air Quality Standards ("NAAQS") at issue in this case. Just as such capital investment restrictions were not economically beneficial in 1935, they are not environmentally beneficial in 2000.

Among MAPI's members are the developers and producers of catalytic converters, fuel injectors, air bags, advanced power generation systems, gas turbines, and many other technologies that improve our lives in myriad ways. The members of MAPI are proud of the contributions they make to safety, fuel economy, and a cleaner environment, and they know that these desiderata do not flow from the tip of the regulator's pen. In its comments on the Office of Management and Budget's 1998 draft Report to Congress on the Costs and Benefits of Federal Regulations MAPI noted:

> Automobile manufacturers and their suppliers devote considerable resources to improving vehicle safety. The benefits NHTSA attributes to its regulation are, in fact, returns on the investment made by manufacturers. The people who work in product and materials research, manufacturing, quality systems, and even – perhaps especially – marketing, like to think that their efforts and their resourcefulness have contributed to the safety of modern cars. The same is also true for environmental benefits and other categories of regulatory benefits – rule writers may have helped, but they did not accomplish all these things on their own.

The substantial progress that has been made in safety and environmental quality over the past 65 years is the product of hard work, creativity, innovation, and capital investment.

Blanket restrictions on new capital investment are a blunt instrument for cleaning the air, and one that was intended to be used only as a temporary measure and only in isolated problem spots. Notwithstanding the demonstrable progress that has been made in air quality, EPA's revised NAAQS would perpetuate and dramatically expand the geographic scope of the nonattainment regulatory regime. The result will be very serious adverse consequences for our nation's economic prosperity, and no or even negative benefits for our environment.

SUMMARY OF ARGUMENT

The delegation of legislative authority in Section 109 of the Clean Air Act – as EPA would interpret it – is as broad, costly, standardless, and as inimical of political accountability as any comparable regulatory delegation since NIRA. Moreover, the delegation issue in this case is likely to recur with more regularity, because of dynamic developments in scientific knowledge and technology. The new paradigmatic case features: (1) a broad delegation to an agency; (2) profound changes in facts, science, or technology; (3) that were not directly addressed by Congress and (4) for which Congress made no administrative provision. Under these circumstances an intelligible principle in the original legislative delegation may no longer provide a meaningful guide to administrative action. This is just such a case.

"[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). MAPI respectfully submits that the Court can mitigate these enforcement difficulties by granting *certiorari* and reaffirming that: (a) only Congress may "establish [or expand] the standard of legal obligation" in the Clean Air Act; (b) both courts and agencies should utilize a narrow rule of construction for nondelegation cases such as this; (c) courts should give greater latitude to forms of delegation that provide a "balancing" principle for administrative action; and (d) a judicial preference for vacating rules rather than statutes is a reasonable and practical way to enforce the constitutional separation between the two political branches without wreaking unnecessary havoc on legislative and administrative processes.

ARGUMENT

I. THIS CASE PRESENTS THE BEST OPPORTUNITY SINCE *BENZENE* FOR THE COURT TO CLARIFY THE LIMITS OF AGENCY DISCRETION WHEN CONGRESS DELEGATES BROAD POWER OVER THE U.S. ECONOMY, BUT FAILS TO PROVIDE AN "INTELLIGIBLE PRINCIPLE" THAT ENCOMPASSES THE AGENCY'S ACTION.

We agree with petitioner EPA and cross-petitioners ATA, *et al.*, that this case presents "an important issue of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). We do not agree with petitioner EPA, however, that *certiorari* is warranted because the D.C. Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Contrary to EPA's assertion, the decision of the Court of Appeals is not a "radical departure from settled law;" but it does, as EPA points out, "raise[] questions respecting the constitutionality of a broad range of federal statutes requiring agencies to draw lines based on scientific judgments." EPA Petition at 9.

The Court of Appeals correctly recognized the vast delegation created by EPA's interpretation of its authority under Section 109 of the Clean Air Act. Citing *Schechter Poultry*, it noted that a "more precise" delegation is required because "the standards in question affect the whole economy." 175 F.3d at 1037. Moreover, the Court of Appeals found that the breadth of the delegation significantly exceeded another regulatory statute with a more focused reach on the U.S. economy where the Court of Appeals had found it necessary to fashion "intelligible principles" to constrain the agency's legislative discretion, *id.*, citing *International Union, UAW v. OSHA (Lockout/Tagout I)*, 938 F.2d 1310 (D.C. Cir. 1991) (discretion to "do nothing at all"

or "take the industry to the brink of ruin," with "all positions in between" would be unconstitutional). *Id.* Here, EPA's discretion runs from doing "close to nothing at all" to "send[ing] industry not just to the brink of ruin but hurtling over it," *Id.* Nor are there any "special theories," such as the war powers of the President, to justify an excessive delegation. *Id.*

In the years since *Schechter Poultry*, the nondelegation doctrine has continued to serve as one of the bulwarks of the constitutional separation of powers. This brief addresses the respective authorities and responsibilities of the three Branches of Government in this type of case. It also addresses other questions raised by petitioners and respondents to the extent that they bear on the meaning and application of the nondelegation doctrine.

A. The Court Should Grant *Certiorari* To Clarify The Application Of The Nondelegation Doctrine To Agency Policy Decisions That Profoundly Affect The Economy And Are Motivated By New (And Contested) Scientific Findings That Congress Neither Foresaw Nor Provided For.

The Court should grant *certiorari* not to reverse the decision of the Court of Appeals, which MAPI believes was essentially correct, but to provide guidance to agencies and reviewing courts as to the application of the nondelegation doctrine to the Clean Air Act and in similar contexts.

This case presents the question of what role the Court's nondelegation doctrine plays where advances in scientific knowledge or technology create a chasm between the factual context that an agency believes it is operating in and the factual context of the original legislation. By altering the meaning of even simple words like "safe" or "zero,"

scientific progress has the potential to render legislative decisions unrecognizable to those who made them.[3]

MAPI respectfully urges the Court to use this opportunity to clarify the proper role the nondelegation doctrine plays in reviewing broad congressional delegations of authority applied to facts that change as science and technology evolve. Twenty years have passed since this Court's decision in. *Industrial Union Dep't v. American Petroleum Institute,* 448 U.S. 607 (1980) (*"Benzene"*). Considering the vast reach of federal regulatory activities today, and the dramatic increase in health, safety, and environmental regulation grounded in scientific judgments, further guidance from the Court on the limits of delegation is necessary and timely.

This Court should grant *certiorari* in order to reaffirm that only Congress may "establish [or expand] the standards of legal obligation" (*Schechter Poultry*, 295 U.S. at 530) imposed in the Clean Air Act, and to provide guidance to EPA, to other Executive agencies, and to all reviewing courts as to their respective responsibilities where an "intelligible principle" is no longer apparent in the legislative delegation because of a change in facts, science, or technology, which Congress neither addressed nor foresaw.

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[3] *See* Randall Lutter and Christopher DeMuth, "Ozone and the Constitution at EPA" American Enterprise Institute (July 1999) at 2 ("But whatever its fate on further appeal or in subsequent cases, the decision has revealed a serious problem at the heart of our environmental laws. The problem is not simply a matter of executive-branch usurpation or legislative-branch abdication; it is inherent in the tension between rigid legislation and fluid science.").

B. The Court Should Grant *Certiorari* To Affirm That The Court Of Appeals Properly Rejected EPA's Interpretation Of Section 109 Of The Clean Air Act As Lacking Any "Intelligible Principle."

The Court of Appeals noted several "intelligible principles" that theoretically could have guided EPA's discretion in its administration of delegated legislative authority, including some that are often used under health/risk regulatory regimes, *e.g.*, cost-benefit analysis, zero-risk, and generic unit of harm. 175 F.3d at 1038-40. However, both EPA and the Court of Appeals believe that cost consideration has been unavailable since *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

With respect to the Clean Air Act, we agree with industry cross-petitioners that this Court's review should encompass current D.C. Circuit case law that reads Section 109 of the Clean Air Act as precluding EPA from considering cost or technological feasibility. We suspect that considerations of cost do in fact influence EPA's thinking, and there is some evidence to that effect in the record. *See* ATA Conditional Cross-Petition, at 37-38 (citing EPA's "soft" $10,000 per ton of emissions reductions compliance-cost cap). We agree with and incorporate by reference cross-petitioners compelling argument that the real culprit here is a wrongly decided *Lead Industries*, especially in light of *Benzene*, *INS v. Chadha*, 462 U.S. 919 (1983), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). *See* ATA Conditional Cross-Petition at 15-26. Therefore, we agree with the cross-petitioners' reformulation of the question to be presented: "Whether the Clean Act requires that the Environmental Protection Agency must, in setting nationwide air-quality standards, ignore all factors 'other than health effects relating to pollutants in the air,' given that considerations of such factors would permit both the Agency and reviewing courts

to avoid confronting constitutional nondelegation issues." ATA Conditional Cross-Petition at 2-3.

II. THE COURT CAN AND SHOULD USE THIS CASE TO SETTLE THE PROPER APPLICATION OF THE NONDELEGATION DOCTRINE AND TO SORT OUT THE ROLE OF ALL THREE BRANCHES OF GOVERNMENT IN ADAPTING LAWS TO CHANGING FACTS.

The proceedings below reveal not only a statutory delegation of legislative authority "not canalized within banks that keep it from overflowing." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring), but an urgent need for this Court to update its guidance for lower court navigation of hitherto uncharted nondelegation waters. The basic doctrine remains intact. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, No. 98-1152, 529 U.S. –, ("*Brown & Williamson*"), slip op. at 39 ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."). But its application is subject to widespread dispute. *See* 195 F.3d at 15 (Silberman, J., dissenting from denial of rehearing en banc) ("The panel, purporting to rely on interpretation . . . . By so doing I believe the panel undermines the purpose of the nondelegation doctrine.") Clearer instruction from this Court would dispel much of the prevailing confusion. *See* Benjamin Cardozo, *The Nature of the Judicial Process* 178 (1921) ("Little by little the old doctrine is undermined. . . . Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.").

Nondelegation decisions in 1935 invalidated Acts of Congress as unconstitutional; today nondelegation is typically combined with the doctrine of constitutional avoidance to provide rules of statutory construction. *See*

Mistretta, 488 U.S. at 371-74 & n.7 (reviewing cases). The underlying principle – legislative accountability – remains unchanged. But the roles of the actors need clarification.

A. The Court Should Update and Refocus the Nondelegation Doctrine on Accountability By Reaffirming A Narrow Rule Of Construction.

The constitutional basis for the nondelegation doctrine, Article I, section 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."), both empowers and constrains the Legislature. As the Court explained in *Schechter Poultry*, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." 295 U.S. at 529. But this provision also constrains the other two branches: neither the Judiciary nor the Executive may legislate on its own authority and initiative, *i.e.*, without an "intelligible principle" having been first laid down by Congress. *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928).

On rare occasions a statute will violate the nondelegation doctrine on its face – NIRA was such a case – because it displays "delegation running riot." *Schechter Poultry,* 295 U.S. at 553 (Cardozo, J., concurring). More often, the combination of a statute's breadth and its ambiguity does not raise a question as to the constitutionality of its delegated authority until an agency attempts to interpret and apply the statute in a concrete setting.

MAPI respectfully submits that the inherent difficulty in enforcing the nondelegation doctrine (*see Mistretta, supra*), would be mitigated if the Court were to grant *certiorari* and reaffirm both a narrow rule of construction in cases such as this and the Court's own preference for vacating rules rather than statutes as a reasonable and practical way to enforce the constitutional separation of

powers between the two political Branches without wreaking unnecessary havoc on legislative and administrative processes.

When nondelegation raises questions about the constitutionality of a legislative enactment, both the agency and the reviewing court have an obligation to construe the statutory delegation of authority narrowly. *Cf. United States v. Heth,* 3 Cranch 399, 413 (1806)(Paterson, J.) ("[T]he words of a statute, if dubious, ought . . . to be taken most strongly against the law-makers."); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992) (Scalia, J. & Thomas, J., concurring in the judgment in part and dissenting in part)("[A]ny ambiguity concerning [a preemption clause's] scope will be read in favor of preserving state power.").

Of course, when the consequences of an agency's rulemaking are massive, any interpretation of an agency's statutory authority "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson,* slip op. at 10.

If the agency is unable to identify an intelligible principle adequate to sustain its regulation, the reviewing court must decide whether to vacate the enactment of the Legislature or the action of the Executive. This Court consistently has preferred the latter as a less drastic remedy. *See Mistretta,* 488 U.S. at 373 n.7 (citing *Benzene,* 448 U.S. at 646; *National Cable Television Assn. v. United States,* 415 U.S. 336 (1974)).

A remand to the administrative agency, such as the Court of Appeals ordered in this case, should be viewed neither as an appeal to the Executive's dispassionate expertise in statutory interpretation nor as an attempt to salvage a foundering statute. Rather, it is simply the most practical way for courts to resolve a conflict between ambiguous legislative authority and a particular agency regulation. This "no-fault" remand should not be thought of

as a "weak form" of the nondelegation doctrine, since the riot gear (overturning the statute) is still available for cases where it is needed.

It is not an unreasonable burden to require an agency either to explain the basis and scope of its discretion or, in the event that its authority is found wanting in the light of new science or technology, to propose a legislative expansion of its authority. The alternative – to permit an agency effectively to amend the statute in view of new science – while perhaps expedient, is constitutionally impermissible.

B. When Congress Delegates Broad Authority, It Should Include Limiting Principles That Are Both Intelligible and Durable.

This Court has long recognized the need for Congress to be able to delegate broad authority to an administrative agency. "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directions." *Mistretta,* 488 U.S. at 372.

But the Court is right to insist that such delegations be accompanied by an intelligible principle to guide the agency's exercise of discretion, in order to preserve the chain of political accountability between the Congress and the consequences of its legislative acts. Where governmental actions require difficult tradeoffs, it is essential that they be exposed to the discipline of political debate and democratic choice.

Congress does not fully discharge its duty merely by voting for good science, public safety, and a clean environment, without giving attention to the means by which statutory goals are achieved and to the range of consequences they may entail. Congress must not only "delineate[] the

general policy" an agency is to apply, it must also set "the boundaries of this delegated authority." *American Power & Light Co. v. SEC,* 329 U.S. 90 (1946).

We argue (supra) that these statutory boundaries should be construed narrowly against a background of changing science. But a principle of narrow construction need not interfere with valid Congressional delegations of authority, as long as the statute makes an appropriate provision for taking new information into account.

For instance, an intelligible principle that requires an administrative agency to balance the beneficial and harmful consequences of its actions is one that can accommodate a wide variety of factual circumstances and changing scientific understandings, without becoming impermissibly broad or vague.[4] It conveys the authority to take a range of actions in response to new information, but it harnesses that authority to a principle that is versatile without being vagrant. It permits the agency to cause harms or to impose substantial costs and obligations – even if they go far beyond what was anticipated by Congress – but only to the extent that they are warranted by a commensurate advancement of statutory objectives.

In contrast, a statutory principle that requires an administrative agency to ignore the harmful consequences of its actions – such as EPA finds in the Clean Air Act – cannot be regarded as durable, however intelligible it may be.[5] Such language must be construed narrowly to apply only to the particular factual context of the original legislation, because

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[4] Lutter and DeMuth, supra n.3, at 2."Setting a standard based on two factors – one increasing and the other decreasing as the standard changes – produces, in principle, a determinate result."

[5] Various commenters have argued that the consideration of costs in setting NAAQS is forbidden (Petitioner EPA), permitted (Cross-petitioners), or required (Lutter & DeMuth). Without trying to resolve the dispute here, MAPI submits that if such consideration is forbidden, the EPA's authority must be narrowly construed. MAPI agrees with cross-petitioners that the Court should review the holding below that *Lead Industries* precludes EPA's consideration of costs.

to do otherwise would impermissibly sever the legislative act from its adverse consequences. If new science becomes available it cannot be presumed that Congress would arrive at the same conclusions that it did at the time of enactment, because (a) it could not consider adverse consequences of which it was not then aware AND (b) it made no provision for the agency to take account of them in an intelligible way.[6] When the Congress puts blinders on an agency, it also applies handcuffs, for an agency cannot be empowered to reach farther than it can see.

Nothing in the Constitution requires that the Congress use a substantive benefit-cost balancing standard when writing laws; nor does it require that the Congress impose such a standard on decisions it delegates to administrative agencies. If it wishes to enact a delegation of authority that is broad and durable, however, the Congress should choose some form of versatile standard that instructs the agency to balance the anticipated desirable and undesirable consequences of proposed administrative actions. Courts should give this form of delegation wide latitude, while at the same time reading narrowly other forms of delegation that are too rigid to allow for administrative adaptation to new facts. That is, the very versatility of the relevant "intelligible principle" can and should play a role in determining how far a particular congressional enactment is intended to reach.

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[6] The majority opinion in *Brown & Williamson* correctly inferred that the rigidity of the statute – unsafe devices must be banned – argued for a narrow construction that did not treat cigarettes as a device. Slip op. at 19. The dissent argued that one could just as easily conclude that such a ban was required (Breyer, J., dissenting), sip op. at 14. Yet the rigidity of the statutory language compels the Court to apply it narrowly; a more flexible "balancing" principle might have been read more broadly.

C. When An Administrative Agency Feels Compelled To Act, But Finds That Changes In Science Have Rendered An Intelligible Principle Unworkable, The Agency Should Seek A Legislative Extension Of Its Authority.

The Court of Appeals in this case correctly recognized the difficulties inherent in a statute that ostensibly takes no account of costs and is applied to a pollutant whose harm displays no discernible threshold. Lacking a clear decision point, and lacking any overt balancing process, the reviewing court was left contemplating the black box of the unconstrained "judgment of the Administrator." The Circuit Court correctly concluded that the EPA's interpretation of Section 109 did not meet the established "intelligible principle" standard. Without a stated statutory limit on the EPA's discretion, the delegation appears "unconfined and vagrant." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring).

Following *Chevron,* the Court of Appeals in this case found that it is up to the agency – not the reviewing court – to rescue the constitutionality of the delegation by discerning the requisite intelligible principle. Of course, the agency, just like the reviewing court, must look to the text, context, and history of the congressional delegation to find such a principle, because Congress is the institution constitutionally accountable for the consequences of any expansion of the "standards of legal obligation." *Schechter Poultry,* 295 U.S. at 530.

Often, however, even where Congress has enacted an intelligible principle into law, some unanticipated change in science or technology may cause that principle to become obsolete, or fail to provide intelligible parameters in certain factual settings.

Under these circumstances, if the agency proposes to promulgate regulations that respond to a changed factual landscape, but cannot find an intelligible principle that

applies to the circumstances at hand, it should request from Congress an expansion of its authority. No administrative agency may lawfully address a given factual situation if its authorizing statute lacks an intelligible principle that can accommodate that situation. Nor can the agency solve the problem merely by consulting with scientists. Science dwells in the realm of fact, and fact by itself cannot make law.

Modern statutes, such as the Clean Air Act, frequently delegate authority to the Executive to decide what is "safe" or "adequate" or "requisite" to protect "the public health." One consequence is that agency rules are often based on scientific findings that are difficult for the courts to review. The degree to which a court should scrutinize an agency's scientific findings, and the degree to which this agency's science could withstand such scrutiny, are both interesting questions. But the more fundamental question is whether science is capable of resolving disputes that have deep economic and political dimensions.

In the present case, the EPA proposes a regulatory regime that imposes far greater costs than benefits – costs that the agency itself refuses to consider. A decision of this gravity must at some point acquire political legitimacy, and the agency must look to Congress to provide it. This political legitimacy can take the form either of an intelligible principle discerned from an existing statute (one adequate to the factual situation), or of an enactment expanding the agency's authority. But neither the judgment of an Administrator nor the conclusions of science can substitute for legislative deliberation.

The agency, whose action precipitated the controversy before the court, is in the best position to decide which of three courses to take: (1) Develop a new interpretation of its statutory authority that dispels any concern about unaccountable delegation; (2) Scale back its own regulation to comply with a narrower interpretation of its statutory authority; or (3) Propose to the Congress a statutory

amendment that would grant the agency the authority it believes it needs.

Petitioner EPA in this case would spurn all three avenues and now asks the Court, in effect, to remove the constitutional impediments to its free exercise of self-ascribed authority. MAPI respectfully urges the Court to grant *certiorari* in order to dispel any notion that such carte blanche authority can be countenanced within the constitutional separation of powers.

CONCLUSION

As this case provides an opportunity for the Court to enunciate the relevance of the nondelegation doctrine in reviewing agency interpretations of broad grants of authority in spheres of rapidly changing science, *amicus curiae* MAPI supports granting a writ of *certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

(*Case captions continued on inside cover*)

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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MASSACHUSETTS AND NEW JERSEY,

Petitioners,

—v.—

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Respondents.

AMERICAN LUNG ASSOCIATION,

Petitioner,

—v.—

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BRIEF OF STATES OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

The northeastern States of New York, Connecticut, Maryland, Maine, New Hampshire, Pennsylvania, Rhode Island and Vermont respectfully submit this brief as *amici curiae* in support of the Petitions for a Writ of Certiorari filed in this matter by the U.S. Environmental Protection Agency (EPA) and Carol Browner, Administrator of EPA; by the States of Massachusetts and New Jersey; and by the American Lung Association (collectively, the "petitions"). The petitions seek review of the D.C. Circuit's decision in *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir.), *reh'g en banc denied*, 195 F.3d 4 (D.C. Cir. 1999), to remand EPA's revised eight-hour ozone National Ambient Air Quality Standards for ozone and fine particulate matter ($PM_{2.5}$).

INTEREST OF THE AMICI CURIAE

The northeastern amici States share an interest in obtaining review of the decision below in order to ensure the adequate protection of their residents' health and their environment. Residents of these States suffer from asthma and other respiratory illnesses aggravated by high levels of ozone and $PM_{2.5}$ in the ambient air. Recent studies document an alarming increase in the asthma hospitalization rate in the northeastern United States including, in particular, the lower income neighborhoods of color in the Bronx and Upper

Manhattan, inhabitants of which suffer from rates of asthma that are at least double the national average.[1] As *parens patriae*, New York and the other amici States have a paramount interest in protecting their residents from the debilitating and potentially life threatening effects of asthma and other respiratory illnesses.

The record of the rulemakings at issue in this matter establishes that the revised standards will have a profound impact on public health, eliminating thousands of premature deaths attributable to air pollution each year and preventing tens of thousands of respiratory illnesses attributable to exposure to ozone and fine particulate matter.[2] Specifically, implementation of the revised standards will greatly improve the quality of life of the children and other persons who suffer from asthma, a disease aggravated by exposure to ozone and $PM_{2.5}$. The court below did not question the scientific basis for EPA's determination that the revised standards are needed to protect public health.

The Clean Air Act (the "Act") places primary responsibility for achieving clean air upon the states. To date, the efforts of many eastern states to obtain clean air that meets the old ozone standard have been hampered by the large amounts of ozone and its precursor, nitrogen oxides, that blow into the region from relatively uncontrolled power plants and

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[1] *See* L. Claudia, *et al.*, *Socioeconomic Factors and Asthma Hospitalization Rates in New York City*, 36(4) Journal of Asthma at 344 (1999).

[2] The health benefits of the required standards are described in more detail in the American Lung Association's petition for certiorari.

other large industrial sources, many of which are located in areas classified as attainment with the old standard. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998). Some states, like New York and Connecticut, are endeavoring to meet their obligation to comply with the old one-hour EPA standard for ozone by the 2007 attainment date, while others, like Vermont and New Hampshire, find that transported pollution complicates their efforts to remain in compliance with the old standard. Implementation of the EPA's revised eight-hour ozone standards nationwide will greatly facilitate the northeastern states' ability to clean their own air because of the emission reductions that will be required throughout much of the eastern portion of the country, including states to the south and west of the amici States.

The interest of the amici States in obtaining review of the D.C. Circuit's decision extends beyond the implementation of the specific standards at issue. As recognized by Judge Tatel's dissent to the denial of the rehearing petition, joined by Chief Judge Edwards and Judge Garland, the D.C. Circuit's holding threatens to paralyze further EPA efforts to improve air quality, at the expense of the health of residents of the amici States and other states:

> Not only did the panel depart from a half century of Supreme Court separation of powers jurisprudence, but in doing so, it stripped the Environmental Protection Agency of much of

> its ability to implement the Clean Air Act, this nation's primary means of protecting the safety of the air breathed by millions of people. App. 91.[3]

Residents of the amici States benefit from a number of EPA programs directed at improving air quality, including EPA's efforts to control interstate transport of ozone and its precursors, and its imposition of more stringent emission control requirements for motor vehicles. Because the poor air quality in the Northeast is attributable in large part to air pollution transported from other states or to motor vehicle emissions that states are barred from regulating, pursuant to section 209(a) of the Act, 42 U.S.C. § 7543(a), the amici States find it extremely difficult to achieve any significant improvement in the quality of their air without EPA's exercise of its authority in other areas to reduce motor vehicle emissions and interstate pollution.

Finally, the ramifications of the nondelegation holding transcend EPA's efforts to obtain clean air for all Americans. The court's nondelegation holding threatens federal efforts to protect the health and safety of Americans under many diverse federal programs. Although the full ramifications of the decision are yet to be determined, it throws into question federal efforts to protect public health and safety in many areas such as automobile safety and airline safety, in addition to

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[3] Citations are to the Appendix filed in support of the Massachusetts and New Jersey petition.

environmental protection. The amici States have a fundamental interest in seeing that the health and safety of their residents do not suffer as a consequence of the D.C. Circuit's decision.[4]

SUMMARY OF ARGUMENT

The D.C. Circuit's decision will prevent or, at a minimum, postpone access to cleaner air for all Americans. The D.C. Circuit recognized the overwhelming body of scientific evidence that supported EPA's determination that the current .120 ppm one-hour ozone standard is inadequately protective of public health. Nevertheless, as a result of the D.C. Circuit's holding, the inadequate one-hour standard will be the only protection Americans will have against the health dangers of ozone pollution for many years to come. Even if EPA is able to formulate an "intelligible principle" to govern its setting of revised standards, the Court's holding that new ozone revised standards may only be implemented in accordance with the facially inapplicable subpart 2 classifications and compliance deadlines means that any protection Americans can expect from revised ozone standards will not be realized or, at best, will be postponed even further.

More generally, the D.C. Circuit's decision effectuates a fundamental alteration of the balance of power among the three branches of government in the area of environmental regulation. In the name of adherence to the principle that the democratically-elected Congress should make the fundamental

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[4] Connecticut, New Hampshire, New York and Vermont participated in the D.C. Circuit proceedings as amici, submitting joint briefs with Massachusetts and New Jersey, which intervened in the cases.

policy determinations, the D.C. Circuit found inadequate the delimiting principles promulgated by Congress in section 109 of the Act, 42 U.S.C. § 7409, and remanded to EPA to come up with its own "intelligible principle" to govern its decisionmaking processes, which will then be reviewed by the D.C. Circuit. In the second portion of its holding, the D.C. Circuit rejected the agency's practical interpretation of the Act, in favor of the court's own technically intricate, but ultimately unsound reading of the relevant provisions. Both aspects of the D.C. Circuit's opinion have the effect of placing policymaking authority in the hands of the judicial branch, rather than the legislative and executive branches of government that are elected by the populace, and throw into doubt other federal efforts to protect the health and safety of Americans.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION ON IMPLEMENTATION OF THE NEW EIGHT-HOUR OZONE STANDARDS WILL POSTPONE THE BENEFITS OF CLEANER AIR FOR MUCH OF THE NATION

The D.C. Circuit's holding that any revised eight-hour ozone National Ambient Air Quality Standard ("NAAQS") may only be implemented in accordance with a statutory schedule and classification scheme intended to address the old ozone NAAQS will have significant ramifications for the amici States' efforts to obtain cleaner air. Regardless of whether EPA, on remand, is able to repromulgate the ozone NAAQS in

accordance with the Court's nondelegation holding, the obstacles erected by the court to implementation of the revised standards may prevent the States from implementing those standards.

The D.C. Circuit's determination that EPA must enforce the revised eight-hour NAAQS in accordance with the classifications and attainment dates adopted by Congress in 1990 is premised on a faulty interpretation of the Act's provisions governing implementation of the ozone NAAQS. At the core of the D.C. Circuit's holding is section 181(a)(1) of the Act, 42 U.S.C. § 7511(a)(1), entitled "Classification and attainment dates for 1989 nonattainment areas," which contains as its centerpiece a table that lists classifications and attainment deadlines for meeting the one-hour .120 ppm standard existing at the time of the 1990 amendments.[5] In reaching its holding that this table governs the classifications and attainment dates for areas found to be in noncompliance with the new eight-hour .080 ppm standards promulgated in 1997 (App. 75), the D.C. Circuit paid no heed to the fact that the classification scheme is

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[5] Table 1 of the statutory provision reads as follows:

Area Class	Design Value [ppm]	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

nonsensical when applied to a .080 ppm standard, rather than a .120 ppm standard, and it failed to explain how a statutory provision with attainment deadlines in the 1990s could possibly govern a revised standard that would not be implemented until after 2000.[6] In the name of allegiance to the statutory text, the D.C. Circuit also disregarded the clear statement in the title of section 181(a)(1) that it only governs "classification and attainment dates for 1989 attainment areas" on the grounds that "a title cannot be allowed to create an ambiguity in the first place." App. 39.

In opposing the granting of certiorari on this issue, industry respondents contend that it is the type of routine statutory interpretation question that is normally not reviewed by the Court. However, the D.C. Circuit's holding, if allowed to stand, throws into doubt the D.C. Circuit's continued adherence to *Chevron* deference. *Chevron U.S.A. Inc. v.*

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[6] Other references in section 181(a) provide further evidence that its provisions are intended to apply only to areas designated as nonattainment with the standard existing at the time of the 1990 amendments. For example, section 181(a)(1) provides that the design value that forms the basis for the classifications should be calculated in accordance with the "interpretation methodology issued by the Administrator most recently before November 15, 1990." Furthermore, section 181(a)(3) provides that the classifications should be made at the time of the designation of an area as nonattainment with the 1990 ozone standard under section 107(d)(4), 42 U.S.C. § 7407(d)(4); there is no procedure for classification under a new or revised standard. Finally, reclassification to nonattainment with the old one-hour .120 standard of areas initially designated as attainment in 1990 is governed by section 181(b)(1), which applies only to areas redesignated as nonattainment with the old one-hour standard under section 107(d)(3), not to areas redesignated as nonattainment with a new or revised ozone standard under section 107(d)(1).

NRDC, 467 U.S. 837 (1984). Instead of deferring to an agency interpretation of section 181(a) of the Act that is consistent with the substance and title of the provision,[7] the D.C. Circuit substituted its own reading of the statute for the reading adopted by EPA. At best, the cross-reference in section 181(a)(1) to section 107(d) rather than just 107(d)(4), which provides the entire shaky foundation for the D.C. Circuit's interpretation, creates an ambiguity in the statute, requiring that deference be given to EPA's reasonable interpretation.[8] The ambiguity of the Act's provisions regarding implementation of revised standards is also reflected by the inability of the panel

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[7] Under similar circumstances, this Court has found that the title of a statute provides valuable evidence of Congressional intent in enacting a statute. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998); *Immigration & Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-89 (1959).

[8] In his opinion concurring in part and dissenting in part, Judge Tatel recognized that it is not the title of section 181(a)(1) that creates the ambiguity but that "the ambiguity in this statute . . . appears in the text of Subpart 2 itself." App. at 77. He explained:

> "As the agency argues, it is thus difficult to see how Subpart 2 can 'specifically provide[]' attainment dates for areas that are designated nonattainment under the new standard but are not covered by table 1. . . This gap in Table 1 makes it at least ambiguous whether Subpart 2 '*specifically* provide[s]' classifications and attainment dates for *all* areas exceeding the revised 0.08 ppm ozone NAAQS." *Id.*

As explained by Judge Tatel, it is for EPA, not the D.C. Circuit, to interpret an ambiguous statute, an interpretation that the D.C. Circuit is bound by *Chevron* to follow if reasonable. App. at 81.

and Judge Tatel to agree on a way to conform the provisions of subpart 1 and subpart 2.[9] However, rather than ensuring that the policy decisions are made by Congress and implemented by executive agencies, the D.C. Circuit's refusal to accord deference to EPA's reading of the statute effectuates a judicial usurpation of policymaking authority. To the extent that the D.C. Circuit's approach in this case signals a weakening of the principle of *Chevron* deference, federal agencies will find it increasingly difficult to fulfill their obligation to serve the public.

Furthermore, implementation of the revised standards will be hindered by the many uncertainties inherent in the court's treatment of the implementation issues. For example, does the panel's opinion allow the implementation of the revised ozone standards under subpart 1 in the large portions of the nation that do not fall into one of the subpart 2 classifications (i.e. areas that do not meet the revised eight-hour standard of .080 but do meet the old one-hour standard of .120)? If Judge Tatel is correct that subpart 1 provides the deadlines for areas that meet the old standard, does that mean

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[9] On rehearing, Judge Tatel concurred in the panel's decision, as modified, because it "leaves open the possibility that EPA can enforce the new ozone NAAQS without conflicting with subpart 2's classifications and attainment dates." (App. 76). Judge Tatel stated that, in his view, "[s]ubpart 2 continues to govern those areas covered by Table 1, just as it did under the old NAAQS, but in areas that have attained the old standard, nothing precludes enforcement of the new standard under subpart 1." (App. 81). However, Judge Tatel's belief that "nothing precludes the enforcement of the new standard under subpart 1" (App. 81) appears to conflict directly with the panel's holding that "[s]ubpart 2, not subpart 1, provides the classifications and attainment dates for *any* areas designated nonattainment under a revised ozone NAAQS." (App. at 39-40) (emphasis supplied).

that EPA must provide those areas with at least five years after they meet the old standard for compliance with the new standard? The apparent disagreement between Judge Tatel and Judges Ginsburg and Williams regarding the meaning of the D.C. Circuit's decision highlights the difficult task facing EPA and the states in conforming their conduct to the decision, making it likely that their attempts to implement the revised primary ozone NAAQS will be tied up in litigation regarding the meaning of the D.C. Circuit's decision for years to come.[10]

II. THE D.C. CIRCUIT'S NONDELEGATION HOLDING IS CONTRARY TO THIS COURT'S ESTABLISHED PRECEDENT AND THROWS INTO DOUBT FEDERAL EFFORTS TO PROTECT THE HEALTH AND SAFETY OF ALL AMERICANS

In its initial opinion, and in the opinion denying rehearing, the D.C. Circuit resuscitated the nondelegation doctrine, holding that, in the absence of a narrowing agency interpretation, section 109 of the Act effectuates an

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[10] In its petition, EPA argues persuasively that the D.C. Circuit erred by reaching out to address the propriety of EPA's plan for implementation of the revised ozone NAAQS, an issue that was not ripe for consideration and not squarely before the court. The apparent failure of Judge Tatel and the panel to agree on the meaning of the D.C. Circuit's holding is directly attributable to the court's error in reviewing non-final agency action, rather than waiting for the agency to take concrete steps to implement the revised NAAQS. In the absence of review by this Court, public health and the environment will be threatened by the delays in implementation of the revised standard that will result from the inevitable litigation over the meaning of the D.C. Circuit's decision.

unconstitutionally broad delegation to EPA. Despite the efforts of industry respondents to recast the decision as a rather mundane and uncontroversial question of administrative law,[11] the court's holding clearly and necessarily includes a determination that the text of section 109 does not contain the "intelligible principle" found by the court to be required by the Constitution to confine administrative decisionmaking. Thus, the D.C. Circuit remanded the case to EPA to articulate another intelligible principle -- other than the principle actually found in the statute -- to govern its decisionmaking.

The doctrinal foundations of this determination are puzzling: having found the criteria articulated by Congress to be constitutionally inadequate, the D.C. Circuit is now inviting EPA to conjure up alternative principles to guide its own exercise of discretion. As explained by Judge Silberman's dissent from the denial of rehearing, this determination turns the nondelegation doctrine on its head, divorcing it from the underlying principle that it is the democratically-elected Congress, rather than appointed administrative agency officials, that should make the fundamental policy determinations. *See* App. 86-88.

The D.C. Circuit's holding threatens to alter profoundly the nation's health and regulatory framework. In finding that section 109 does not contain the required "intelligible principle," the court departed from decades of precedent

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[11] *See, e.g.*, Brief in Response for the Respondents Appalachian Power Co., et al., at 13; Brief in Response for Respondents American Trucking Associations, Inc., et al., at 11-14.

upholding even broader delegations.[12] As explained by Judge Tatel in dissent, joined by Chief Judge Edwards and Judge Garland, "the Clean Air Act's requirement that EPA set air quality standards 'requisite to protect public health' with 'an adequate margin of safety' based on criteria that 'accurately reflect the latest scientific knowledge' is far more specific than the sweeping statutory delegations consistently upheld by the Supreme Court for more than sixty years." App. 90. *See also* EPA Pet. at 11-19.

The delegation at issue is also narrower than many delegations of regulatory authority found in other statutes intended to protect public health and safety. For example, the federal statutes governing pesticide residues in foods and hazardous waste transportation contain delegations for adoption of regulatory standards that are more open-ended than EPA's authority to promulgate NAAQS. *See* 21 U.S.C. § 346a (pesticide residues in food);[13] 42 U.S.C. § 6923(a) (hazardous waste transportation).[14] EPA's discretion in adopting new or

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[12] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373 (1989); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FPA v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944); *Touby v. United States*, 500 U.S. 160 (1991).

[13] Under section 408(b) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(b), EPA may establish a tolerance for levels of particular pesticides on food if EPA determines "that there is a reasonable certainty" that no harm will result from exposure.

[14] Section 3003 of the Solid Waste Disposal Act, 42 U.S.C. § 6923(a), requires EPA to promulgate standards for the transportation of hazardous waste "as may be necessary to protect human health and the

(continued...)

revised NAAQS is also more circumscribed than the authority of the National Highway Traffic Safety Administration (NHTSA) to promulgate motor vehicle safety standards, which is limited only by the requirement that the standards be "practicable, meet the need for vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). NHTSA's obligation to "consider relevant available motor vehicle safety information" (*id.* at § 30111(b)(1)) is less restrictive than the requirement that the NAAQS be "based on" on air quality criteria (42 U.S.C. § 7409(b)(11); and its duty to "consult" with other agencies (*id.* at § 30111(b)(1)) is more open-ended than EPA's obligation to consider, and explain any departure from, the CASAC recommendations. 42 U.S.C. § 7607(d)(3). Rules relating to airline safety are also promulgated under an equally broad delegation.[15]

Thus, unless the D.C. Circuit's ruling is reversed by this Court, it may lead to the undoing of federal regulations regarding such important matters as airline safety and automobile safety, in addition to environmental protection. A

(...continued)
environment."

[15] The Federal Aviation Administration (FAA) promulgates standards governing airline safety under 49 U.S.C. § 44701. Pursuant to section 44701(c), FAA is required to carry out this responsibility "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." In doing so, the FAA is required to "consider . . . the duty of an air carrier to provide the highest possible degree of safety in the public interest; and . . . differences between air transportation and other air commerce." This standard is similar to EPA's obligation to enact standards "requisite to protect public health" with an "adequate margin of safety."

decision joined by only four of the eleven members of the D.C. Circuit should not be allowed to effect such a profound alteration of this nation's health and safety regulatory framework without review by this Court.[16]

CONCLUSION

For the reasons set forth above and in the petitions, the Court should grant certiorari in these cases.

Dated: March 28, 2000

Respectfully submitted,

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[16] Two of the eleven members of the court did not participate.

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Nos. 99-1263 and 99-1265

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS AND STATE OF NEW JERSEY, PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

AMERICAN LUNG ASSOCIATION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

No. 99-1263

COMMONWEALTH OF MASSACHUSETTS AND STATE OF NEW JERSEY, PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

No. 99-1265

AMERICAN LUNG ASSOCIATION, PETITIONER

v.

AMERICAN TRUCKING ASSOCIATIONS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

The Solicitor General, on behalf of the federal respondents, supports the petition for a writ of certiorari filed by the Commonwealth of Massachusetts and the State of New Jersey and the petition for a writ of certiorari filed by the American Lung Association. Those petitions, like the federal government's petition in *Browner* v. *American Trucking Ass'ns*, No. 99-1257, seek review

of a judgment of the United States Court of Appeals for the District of Columbia Circuit that remands the Environmental Protection Agency's (EPA's) final rules revising the National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter. See Clean Air Act § 109, 42 U.S.C. 7409.

As the federal government explained in its petition, the court of appeals' rulings on the nondelegation doctrine and the scope of EPA's authority to implement a revised ozone NAAQS present issues of immense practical and legal importance that have a direct impact on the health of the American public. The petition of the States and the petition of a major public health organization underscore those points and provide additional information, perspective, and context for the legal issues framed in the federal government's petition. Those petitions should therefore be granted and consolidated for briefing and argument with the federal government's petition in No. 99-1257.

Respectfully submitted.

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MARCH 2000

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(14) (12) (12)
Nos. 99-1257, 99-1263, 99-1265,
99-1426, 99-1431, 99-1442
(5) (5) (5)

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Conditional Cross-Petitioners,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, *et al.*,

Conditional Cross-Respondents.

On Conditional Cross-Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONSE OF AMERICAN LUNG ASSOCIATION TO CONDITIONAL CROSS-PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency must base primary national ambient air quality standards solely on health effects relating to pollutants in the air.

RULE 29.6 DISCLOSURE, AND LIST OF PARTIES BELOW

American Lung Association (ALA) adopts the Rule 29.6 disclosure, and list of parties below, set forth in ALA's petition for certiorari at ii-v.

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CITATIONS TO DECISIONS ENTERED IN THE CASE; BASIS FOR JURISDICTION IN THIS COURT; AND CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

American Lung Association (ALA) adopts the citations to decisions entered, the basis for jurisdiction in this Court, and the constitutional provisions, statutes and regulations involved in this case set forth in ALA's petition for certiorari at 1-2.

STATEMENT OF THE CASE

ALA adopts the statement of the case set forth in ALA's petition for certiorari at 2-15. In addition, ALA notes that in the rulemakings at issue, the Environmental Protection Agency (EPA) rejected requests that the agency consider factors other than health effects relating to pollutants in the air. 62 Fed. Reg. 38683-88 (July 18, 1997); 62 Fed. Reg. 38878-83 (July 18, 1997). Specifically, EPA found that in setting primary national ambient air quality standards, the agency was statutorily barred by the Clean Air Act from considering such other factors. *Id.* The court below affirmed this aspect of EPA's decision under step one of *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), basing its ruling on the plain meaning of the Act and on longstanding D.C. Circuit precedent. App. 17-20.[1] *Accord, id.* at 13.

[1] Citations to "App." refer to the appendix filed by Massachusetts and New Jersey in No. 99-1263. In addition, for purposes of brevity, this response uses the phrase "non-health factors" to encompass all factors other than health effects relating to pollutants in the air.

BEST AVAIL

ARGUMENT

The cross-petitions of American Trucking Associations (ATA) and Appalachian Power Company seek to reopen an issue that has been the subject of consistent interpretation by EPA for three decades and by the D.C. Circuit for two decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Specifically, cross-petitioners seek to reopen the long-standing conclusion of EPA and the D.C. Circuit that Clean Air Act § 109(b)(1) – which mandates national ambient air quality standards (NAAQS) that "protect the public health" with "an adequate margin of safety" – "bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). Cross-petitioners advance the curious assertion that by opening up this straightforward public health mandate to a plethora of other additional factors not specified in the statute, the extent of the congressional delegation can be *reduced*. The additional factors advocated by cross-petitioners are variously described as "overall impacts on society," Appalachian Power Cross-Pet. at 14, "economic or pragmatic factors," ATA Cross-Pet. at 22, "practical impacts," Appalachian Power Cross-Pet. at 15, "economic and social consequences," ATA Cross-Pet. at 23, or "broad economic, environmental, and indirect public health consequences." Appalachian Power Cross-Pet. at i. Moreover, cross-petitioners are apparently uncertain as to whether EPA's consideration of these factors is discretionary or mandatory. Their proposed cross-questions do not ask for a

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determination that such consideration is mandatory,[2] and at least one of their cross-petitions advances the view that it is discretionary. Appalachian Power Cross-Pet. at 8 (the D.C. Circuit was "not unreasonable" in holding that EPA is not required to consider cost and feasibility; "a *requirement* to consider costs could allow costs to override public health") (emphasis in original). Elsewhere, however, they assert that EPA "must" consider non-health factors. Appalachian Power Cross-Pet. at 18; ATA Cross-Pet. at 22, 26. *Accord*, Ohio Rsp. to Cross-Pets. at 12.

The ATA and Appalachian Power cross-petitions should be denied. Cross-petitioners' argument that the Court can avoid the constitutional nondelegation question by adopting a statutory interpretation that greatly *increases* the scope of the congressional delegation is patently meritless. Moreover, under this Court's precedent, the constitutionality of the Act and EPA's interpretation can and should be upheld, regardless of how cross-petitioners' questions might be answered. Cross-petitioners do not even defend the D.C. Circuit's conclusion that the Clean Air Act is unconstitutional, and indeed ATA concedes that the Act "undisputedly" is constitutional. ATA Rsp. at 15. Cross-petitioners likewise do not explain how a constitutional statute can be made unconstitutional by an agency interpretation, and this Court's precedent establishes that it cannot.

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[2] The questions focus on whether EPA "must *ignore*" the non-health factors, ATA and Appalachian Power Cross-Pets., and Ohio Rsp. to Cross-Pets., at i (emphasis added), not on whether EPA must *consider* them.

Thus, far from contributing to this Court's resolution of the nondelegation question, the proposed cross-questions are irrelevant to – and a distraction from – that question. Cross-petitioners are simply seizing upon the lower court's incorrect nondelegation ruling as a means to obtain review of a question that was long ago decided – correctly – by EPA and the D.C. Circuit, and on which the Court has repeatedly denied certiorari.

I. THE QUESTION WHETHER NON-HEALTH FACTORS MAY BE CONSIDERED IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS IS SEPARATE FROM, AND UNNECESSARY TO THE RESOLUTION OF, THE NONDELEGATION ISSUE.

A. The Clean Air Act and EPA's Interpretation Pass Muster Under the Nondelegation Doctrine, Regardless of Whether the Act Prohibits, Allows, or Requires Consideration of Non-Health Factors.

In an attempt to obtain review of an issue unworthy of certiorari, cross-petitioners contend that the question whether Clean Air Act § 109(b)(1) permits EPA to consider non-health factors in setting primary NAAQS is "intertwined with" the nondelegation question. ATA Cross-Pet. at 7. *See also* Appalachian Power Cross-Pet. at 4. To the contrary, cross-petitioners' proposed issue addressing non-health factors is not implicated by the lower court's constitutional nondelegation ruling, and review of that statutory issue would in no way assist this Court's review of that ruling. Under this Court's nondelegation jurisprudence, the statutory provisions at

issue in this case, and EPA's interpretation of those provisions, are unquestionably constitutional, regardless of whether the statute requires that EPA consider only direct health impacts of air pollutants (as the lower court correctly held) or whether the agency may – or must – also consider other factors such as cost, socioeconomic factors, and indirect health impacts. Thus, to review the lower court's nondelegation ruling, the Court need not decide whether these other factors may or must be considered by EPA. We turn first to the constitutionality of the Act, and then to the constitutionality of EPA's interpretation of the Act.

Constitutionality of the Act. Cross-petitioners do not defend the lower court's holding that the Clean Air Act violates the nondelegation doctrine. *See* App. 12 (finding that "*statutory language* and an existing agency interpretation involve an unconstitutional delegation of power") (emphasis added); App. 4 ("nor is [an intelligible principle] . . . apparent from the statute"). To the contrary, ATA acknowledges that the Act is "undisputedly" constitutional. ATA Rsp. at 15.

ALA agrees. To pass muster under the nondelegation doctrine, Congress need only specify an "intelligible principle" to guide agency implementation. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). This Congress has plainly done here, with the mandate for NAAQS that "protect the public health" with "an adequate margin of safety," and with ample additional guidance in the Act and legislative history. This Court has "upheld, . . . without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373. Indeed, contrary to the lower court's insistence on a "determinate criterion,"

App. 5, the Court has upheld statutes specifying thoroughly non-determinate criteria such as "fair and equitable" prices, *Yakus v. United States*, 321 U.S. 414, 426-27 (1944), "excessive profits," *Lichter v. United States*, 334 U.S. 742, 778-86 (1948), "just and reasonable" rates, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-601 (1944), and even the "public interest," *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). As Justice Scalia put it: "[w]hat legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting on other grounds, but agreeing with majority's conclusion that the statute at issue set forth an intelligible principle).

Indeed, this Court's precedent not only confirms ATA's concession that the Clean Air Act is "undisputedly" constitutional, but also establishes that the Act's constitutionality does not in any way depend on whether consideration of costs or other non-health factors is statutorily authorized or mandated. In *American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490 (1981), concern was expressed by a dissenting Justice that Congress had written the Occupational Safety and Health Act so broadly as to allow three possible interpretations concerning the role of cost-benefit analysis: that Congress "required" the agency to engage in such analysis, that it "prohibited" the agency from doing so, or that it "permitted" the agency to do so. 452 U.S. at 545, 548 n.* (Rehnquist, J.). The majority squarely held that such statutory flexibility would *not* create a delegation problem: "Even [if] . . . there were three possible constructions of the

phrase 'to the extent feasible[,]' . . . *this would hardly have been grounds for invalidating § 6(b)(5) under the delegation doctrine.* After all, this would not be the first time that more than one interpretation of a statute had been argued." *Id.* at 541 n.75 (emphasis added).

As *American Textile* makes clear, this Court can resolve the nondelegation challenge to the Clean Air Act without reaching or deciding whether consideration of costs and other non-health factors is prohibited, allowed, or required.

Constitutionality of EPA's Interpretation of the Act. Moreover, consideration of the role of non-health factors is unnecessary to review of the constitutionality of EPA's interpretation of the Act. First, as stated above, the Court can and should rule – without resolving whether consideration of non-health factors is prohibited, allowed, or required – that the Act passes muster under the nondelegation doctrine. This "undisputed[ ]" constitutionality of the Act (ATA Rsp. at 15) necessarily entails the further conclusion that the lower court erred in requiring EPA to undertake a narrowing construction of the Act. A narrowing construction would only be appropriate if the Act "might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7. No party contends that the Act is or might be thought to be unconstitutional, and any such contention would be patently meritless under the Court's nondelegation precedent. Accordingly, no narrowing construction can possibly be required under the constitutional nondelegation doctrine, and the lower court's insistence on one was error. Because the premise of this conclusion (the undisputed constitutionality of the Act) does not depend in any way

on resolving what role non-health factors have in the setting of NAAQS, the conclusion itself does not require such resolution either.

Second, the core of the lower court's nondelegation ruling was the requirement that EPA specify a "determinate criterion for drawing lines." App. 5. This Court has held, however, that the Constitution does not require an agency to specify *any* rule of thumb to constrain its case-by-case determinations – much less a "determinate" rule of thumb:

> Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case-by-case method, the Constitution offers no obstacle.

American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946). Moreover, because the Court's nondelegation precedent has repeatedly upheld non-determinate standards set forth directly in *statutes*, p. 6, *supra*, there is in any event no constitutional basis for requiring agency *interpretations* to be determinate. Accordingly, regardless of whether the Clean Air Act prohibits, allows or mandates consideration of non-health factors, the lower court erred in ruling that the nondelegation doctrine requires EPA to prescribe a "determinate criterion" to govern the agency's decisionmaking.

B. Cross-Petitioners' Proposed Interpretation of the Act Would Broaden, Not Narrow, the Scope of the Congressional Delegation, and Therefore Would Not Avoid the Constitutional Non-delegation Issue.

Cross-petitioners also argue that the Court could avoid deciding the constitutional nondelegation issue by construing the Act to allow consideration of non-health factors. ATA Cross-Pet. at 22; Ohio Rsp. to Cross-Pet. at 2. This argument must be rejected for two reasons.

First, as shown above, the Court's precedent clearly establishes that the Clean Air Act passes constitutional muster under the nondelegation doctrine. There is no merit to cross-petitioners' request that the Court avoid that clear-cut issue – especially when the consequence of such avoidance would be to reach out and decide an issue that has been settled in the agency and the D.C. Circuit for decades, and on which this Court has repeatedly denied certiorari. *See* ATA Cross-Pet. at 5.

Second, cross-petitioners err in asserting that their interpretation would, if adopted, avoid the constitutional issue. Cross-petitioners' argument necessarily rests on the assumption that *expanding* the statutorily cognizable factors beyond health would *narrow* the scope of the congressional delegation. The opposite is true: for reasons stated by then-Justice Rehnquist in *American Textile*, a health-only mandate involves a far narrower delegation than one that allows an agency to balance health against other factors. ALA Pet. at 19-20 (quoting then-Justice Rehnquist).

Indeed, under cross-petitioners' open-ended construction of the Act, *any* conceivable factor would be cognizable by EPA. ATA Cross-Pet. at 23 ("the key text of Section 109(b) rules in consideration of 'public health,' but fails to *rule out* consideration of anything") (emphasis in original); Ohio Rsp. to Cross-Pets. at 11 (§ 109 "does not preclude consideration of *any* factor") (emphasis added). As these assertions make clear, if § 109(b)'s express reference to public health were to be construed as non-exclusive, there is no *statutorily* specified limit to the other factors EPA might be allowed to consider. As demonstrated by cross-petitioners' own multifarious descriptions of their proposed non-health factors, *see supra* at p. 2 (quoting cross-petitioners), reading such factors into the Act would result in a truly broad-ranging delegation. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 662 (1980) (Rehnquist, J., dissenting, explains why he concluded that the Occupational Safety and Health Act represents an unconstitutionally excessive delegation: "If § 6(b)(5) authorizes the Secretary to reject a more protective standard in the interest of administrative feasibility, I have little doubt that he could reject such standards *for any reason whatsoever*, including even political feasibility.") (emphasis added).

Remarkably, cross-petitioners' proposed interpretation actually would take the Court in a direction diametrically *opposite* to that followed in *Natl. Cable Television v. United States*, 415 U.S. 336 (1974), one of two cases cited in *Mistretta* as having adopted a narrowing interpretation to avoid a nondelegation issue. Construing a statute requiring fees to be "fair and equitable taking

into consideration direct and indirect cost to the Government, value to the recipient, *public policy or interest served, and other pertinent facts," id.* at 337, *Natl. Cable* concluded that the italicized factors should be disregarded. *Id.* at 342-43. As a result, "[t]he phrase 'value to the recipient' is . . . the measure of the authorized fee." *Id.* By contrast, the interpretation proposed by cross-petitioners here would *add* factors to the public health factor enumerated in the statute, thereby *broadening* the scope of the congressional delegation. Cross-petitioners' novel proposal to adopt a "widening" construction of the Act would not avoid the nondelegation issue, and should be rejected.

II. CROSS-PETITIONERS' PROPOSED QUESTION SEEKS TO UPSET THREE DECADES OF AGENCY INTERPRETATION, AS WELL AS TWO DECADES OF D.C. CIRCUIT PRECEDENT ON WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI.

Twenty-nine years ago, only four months after enactment of the §§ 109 and 108 provisions governing NAAQS, EPA concluded that the Act "does not permit any factors other than health to be taken into account in setting the primary standards." 36 Fed. Reg. 8186 (April 30, 1971). Since that time, the agency has not wavered from its initial interpretation. *See, e.g.*, 62 Fed. Reg. 38683-88 (July 18, 1997).

Moreover, two decades of jurisprudence by the D.C. Circuit has affirmed that (as stated by the court below) "§ 109(b) . . . bar[s] EPA from considering any factor other than health effects relating to pollutants in the air." App. 13 (internal quotations omitted). *See Lead Industries Ass'n*

v. EPA, 647 F.2d 1130, 1148-51 (D.C. Cir. 1980); *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981); *Natural Resources Defense Council v. Administrator*, 902 F.2d 962, 972-73 (D.C. Cir. 1990); *Natural Resources Defense Council v. USEPA*, 824 F.2d 1146, 1158-59 (D.C. Cir. 1987) (en banc) (*"Vinyl Chloride"*); *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Contrary to cross-petitioners' assertions that this caselaw has been superseded by *Chevron*, the D.C. Circuit has confirmed the exclusiveness of health factors in the NAAQS process repeatedly since *Chevron*. *NRDC v. Administrator; Vinyl Chloride; ALA v. EPA*. Moreover, *Lead Industries* itself, though pre-dating *Chevron*, was nonetheless decided "in Chevron step one terms." App. 18.

As cross-petitioners recognize, this Court has repeatedly denied certiorari on these decisions. ATA Cross-Pet. at 5. Moreover, these decisions are consistent with this Court's precedent. In *Union Electric Co. v. EPA*, 427 U.S. 246, 257 n.5 (1976), a decision construing the Clean Air Act, the Court concluded: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." Because Congress did not so provide in § 109(b)(1), EPA properly excluded those factors from consideration.

Likewise, the Court has recently held that the determination whether a product is "safe" within the meaning of the Food, Drug, and Cosmetic Act encompasses only whether "the *product itself* is safe," not whether regulation of the product could produce *indirect* adverse health effects. *FDA v. Brown & Williamson Tobacco Corp.*, U.S. Sup. Ct. No. 98-1152 (March 21, 2000), slip op. at 17

(emphasis in original). The Food and Drug Administration had argued that a cigarette ban would not be "safe" because it would produce indirect adverse effects: "current tobacco users could suffer from extreme withdrawal, the health care system and available pharmaceuticals might not be able to meet the treatment demands of those suffering from withdrawal, and a black market offering cigarettes even more dangerous than those currently sold legally would likely develop." *Id.* at 16. The Court rejected this argument:

> [T]he FDA's conception of safety would allow the agency, with respect to each provision of the FDCA that requires the agency to determine a product's "safety" or "dangerousness," to compare the aggregate health effects of alternative administrative actions. This is a qualitatively different inquiry. . . . Section 352(j) focuses on dangers to the consumer from use of the product, not those stemming from the agency's remedial measures.

Id. at 17-19. This ruling directly supports EPA's and the D.C. Circuit's consistent position that the agency may consider only health effects relating to pollutants in the air – not *indirect* health effects.

Given EPA's and the D.C. Circuit's long-settled interpretation; this Court's prior denial of certiorari; and the consistency of the D.C. Circuit's position with this Court's precedent, there is no reason for the Court at this late date to change course and accept cross-petitioners' proposed issue for review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE ACT EXCLUDES NON-HEALTH FACTORS FROM THE SETTING OF PRIMARY NAAQS.

Another reason for denying certiorari on cross-petitioners' proposed issue is that the lower court was plainly correct in ruling that primary NAAQS must be based only on direct health effects of air pollutants. Section 109(b)(1) specifies that primary NAAQS must be "requisite to protect the *public health.*" (Emphasis added.) Moreover, primary NAAQS must be "based on" air quality "criteria," § 109(b)(1), which in turn "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on *public health* or welfare which may be expected *from the presence of such pollutant in the ambient air,* in varying quantities." § 108(a)(2) (emphasis added). Thus, the statute clearly provides that factors other than direct health impacts of air pollutants have no place in the setting of primary national ambient air quality standards.[3]

This conclusion, clear enough on the face of §§ 109(b)(1) and 108(a)(2), is confirmed by other portions of the 1970 Act, which show that Congress knew how to expressly incorporate non-health factors when it wished to do so. For example, § 108(b)(1) provides for EPA to issue "information on air pollution control techniques, which information shall include data relating to the *cost* of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the

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[3] Section 108(a)(2)'s reference to "welfare" is relevant only to the setting of *secondary* national ambient air quality standards, which are to "protect the public welfare." § 109(b)(2).

emission control technology." (Emphasis added.) However, such non-health data is not for the purpose of setting NAAQS, but rather is to be "issue[d] to the States and appropriate air pollution control agencies." § 108(b)(1). Indeed, § 109(b)(1) omits any reference to the § 108(b)(1) control techniques information, instead expressly providing that primary NAAQS are to be "based on . . . [the] *criteria*." (Emphasis added.)

Non-health factors were also referenced in other provisions of the 1970 Act. For example, the 1970 Act retained a preexisting provision mandating "a comprehensive study of the *economic impact* of air quality standards on the Nation's industries, communities, and other contributing sources of pollution, including an analysis of the national requirements for and the *cost* of controlling emissions to attain such standards of air quality as may be established pursuant to this Act." 1970 Act § 312(a), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Legislative History") at 7431. Tellingly, § 109(b)(1) omits any reference to such economic and cost analysis as a basis for NAAQS.

In addition, the 1970 Act provided that NAAQS were to be attained within three years from approval of air pollution control plans, § 110(a)(2)(A)(i), 1970 U.S. Code Cong. & Ad. News 1959-60, but allowed for extensions if it could be shown that "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period." § 110(e)(1)(A), 1970 U.S. Code Cong. & Ad. News 1962. Likewise, other provisions of the Act expressly incorporate non-health factors such as cost and feasibility. § 111(a)(1), 1970 U.S. Code Cong. & Ad. News

1963 (new source performance standards must provide for the degree of emission reduction that is "achievable," "taking into account the cost of achieving such reduction"); § 231(b), 1970 U.S. Code Cong. & Ad. News 1989 (aircraft emission standards shall take effect after such period as is necessary "to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance").

"[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another[.]" *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotations omitted). Recognizing this general principle, this Court has specifically held, in a decision construing the Clean Air Act: "Where Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided." *Union Electric*, 427 U.S. at 257 n.5. Because Congress did not provide for non-health factors to be considered in setting primary NAAQS, EPA is not permitted to consider them.

The absence of non-health factors from the statutory provisions governing primary NAAQS, coupled with their presence in other portions of the Act, is fully sufficient grounds to reject cross-petitioners' proposed interpretation of the Act. But there is additional compelling evidence that Congress's exclusion of non-health factors from the setting of NAAQS was a deliberate choice.

1967 Act. For example, in the predecessor to the 1970 Act (the Air Quality Act of 1967), Congress had provided for issuance of air quality criteria and control techniques

information by EPA's predecessor agency, the Department of Health, Education, and Welfare (HEW). As in the 1970 Act, criteria were defined in terms of direct effects of air pollutants on health, in wording very similar to the comparable wording in § 108(a)(2) of the 1970 Act.[4] As in the 1970 Act, control techniques information encompassed consideration of non-health factors such as cost – indeed, it was even broader, expressly requiring "cost-effectiveness analyses."[5] As in the 1970 Act, ambient air quality standards were to be established. 1967 Act § 108(c), 1967 U.S. Code Cong. & Ad. News 523-24.

Despite the similarities, however, the 1967 Act differed in certain key respects from the 1970 Act. Under the 1967 Act, not only control techniques, but also air quality *criteria*, were to be "issue[d] to the *States*," § 107(b)(1), 1967 U.S. Code Cong. & Ad. News 522 (emphasis added), which were to have the first opportunity to establish ambient air quality standards. § 108(c)(1), 1967 U.S. Code Cong. & Ad. News 523. HEW was to determine whether

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[4] 1967 Act § 107(b)(2), 1967 U.S. Code Cong. & Ad. News 522 (criteria shall "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent, or combination of agents in the ambient air, in varying quantities").

[5] 1967 Act § 107(c), 1967 U.S. Code Cong. & Ad. News 522-23 (control techniques information was to include "technical data relating to the technology and costs of emission control," and "such data as are available on the latest available technology and economic feasibility of alternative methods of prevention and control of air contamination including cost-effectiveness analyses").

"such State standards are consistent with the air quality criteria *and recommended control techniques.*" *Id.* (emphasis added). If a state failed to establish standards, or if a Governor so requested, HEW was authorized to issue federal ambient air quality standards, which – like state-issued standards – were to be "consistent with the air quality criteria *and recommended control techniques.*" § 108(c)(2), 1967 U.S. Code Cong. & Ad. News 523-24 (emphasis added).

In enacting the 1970 Act, Congress rejected several key aspects of the 1967 approach. Of key importance, Congress *deleted* the linkage between control techniques information and ambient air quality standards: instead of being consistent with the criteria *and* control techniques information, standards were henceforth to be based only on the "criteria," § 109(b)(1) – i.e., based only on direct health effects of air pollutants.

This conclusion is further confirmed by another change made by the 1970 Act. Specifically, in 1970 Congress shifted responsibility for ambient standard-setting from the states to EPA, and accordingly deleted the 1967 Act's requirement that criteria be issued "to the States." § 108(a)(2) ("EPA shall *issue* air quality criteria") (emphasis added). In sharp contrast, Congress *retained* the 1967 Act's requirement that *control techniques information* be issued "to the States and appropriate air pollution control agencies," § 108(b)(1), thus confirming that that information – and the non-health factors addressed in it – is not for use in *EPA's* standard-setting.

Finally, the 1970 Act deleted the 1967 Act's requirement that control techniques information include "cost-

effectiveness analyses." If Congress did not provide for such analyses to be included even in control techniques information, which under § 109(b)(1) is irrelevant to NAAQS-setting, there is no basis for asserting that such analyses are required or even permissible in establishing the NAAQS themselves.

1970 House and Senate Bills. Further confirmation of Congress's decision to exclude non-health factors is found in the evolution of the 1970 committee bills. First, the Senate bill provided for ambient air quality standards to be based on health, with no provision for consideration of non-health factors. S. Rep. 1196, 91st Cong., 2d Sess. 86 (1970). The Senate Committee noted that "[i]n the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards." *Id.* at 2. The Senate Committee concluded that "the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible." *Id.* As Senator Muskie explained:

> The first responsibility of Congress is not the making of technological or economic judgments – or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time. But if health is to be protected, these challenges must be met.

116 Cong. Rec. 32901-02 (September 21, 1970). *See Union Electric*, 427 U.S. at 257 ("[The Act's] requirements are of a 'technology-forcing character,' and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.") (citation omitted).

Second, although the House bill adopted an approach weaker than that of the Senate bill, the conferees rejected the House approach. The House bill, though it did not expressly require or allow NAAQS to be based on non-health factors, did not include as strong a mandate for consideration of health as the Senate bill. 116 Cong. Rec. 19224 (June 10, 1970). Moreover, other provisions of the House bill provided for consideration of non-health factors in implementing the NAAQS.[6] In response, the conferees deleted any references that they believed would diminish public health protection:

> In respect to economic feasibility, it is clear again beyond any shadow of a doubt that Congress intended that this not be a factor insofar as

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[6] For example, the House bill had authorized EPA to file federal enforcement actions where NAAQS were not being met, and had provided that district courts would have jurisdiction to order appropriate relief, "giving due consideration to the practicability and to the technological and economic feasibility of complying with provisions of the [pollution control] plan established to implement such [ambient air quality] standards." 116 Cong. Rec. 19225 (House bill § 108(c)(4)). The conferees deleted that provision in favor of an enforcement authority not premised on practicability or technological and economic feasibility. 1970 Act § 113, 1970 U.S. Code Cong. & Ad. News 1966-68.

> the primary standards were concerned relating to public health. Economic feasibility was included in the House bill, it was hotly debated in conference and it was deleted.

Implementation of the Clean Air Act Amendments of 1970 – Part I, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works (February 16-23, 1972), at 18-19 (remarks of Senator Eagleton, a 1970 Act conferee).

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> Giving due consideration to economic and technological feasibility of compliance.
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Id. at 21 (remarks of Senator Eagleton).

In short, the evolution of the Senate and conference bills clearly shows that the absence of non-health factors from § 109(b)(1) was no accident, but reflects a deliberate congressional choice.

Post-1970 Congressional Action. Twice since 1970, Congress has enacted major overhauls of the Act – in 1977 and 1990. Yet, despite the longstanding agency and judicial interpretations construing the Act, Congress did not amend § 109 or 108 to allow or mandate consideration

of non-health factors in NAAQS-setting. To the contrary, Congress continued the 1970 Act's mandate that NAAQS be based on direct health effects of air pollutants, and instead made adjustments in the provisions governing implementation of NAAQS. *E.g.*, Pub. L. 95-95, § 129(b), 91 Stat. 746-47 (August 7, 1977) (adding § 172(a), which authorized attainment deadlines to be extended to 1982, with a possible further extension to 1987); Pub. L. 101-549, §§ 101-111, 104 Stat. 2399-2471 (November 15, 1990) (extensive amendments addressing designation of areas violating NAAQS, preparation of pollution control plans, and deadlines for attainment of NAAQS).

In 1977, Congress amended § 109 by adding a requirement for periodic review and revision of NAAQS at intervals of no more than five years. § 109(d). Far from changing § 109(b)(1)'s exclusive focus on direct health effects of air pollutants, Congress expressly reaffirmed that focus with an express cross-reference to § 109(b). § 109(d)(1).[7]

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[7] Section 109(d) also mandated a scientific review committee, which was to advise EPA (inter alia) "of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards." § 109(d)(2)(C)(iv). Section 109(d) neither authorizes nor requires EPA to consider the § 109(d)(2)(C)(iv) factors in revising NAAQS, and the legislative history confirms that those factors were designed to be "of interest and assistance *to the States and to Congress* in fashioning future legislation." H.R. Rep. 294, 95th Cong., 1st Sess. 183 (1977), *reprinted in* 1977 Legislative History at 2650 (emphasis added).

In addition, the 1977 Amendments provided for consideration of non-health factors in various provisions of the Act, once again demonstrating that Congress knew how to incorporate such factors when it wished to do so. For example, the 1977 Amendments added § 317, 42 U.S.C. § 7617, which mandates an "economic impact assessment" in connection with certain specified proceedings, not including NAAQS, § 317(a), and even as to the covered proceedings cautions that the assessment requirement does not change the substantive factors EPA is required to consider. § 317(c).

Likewise, the 1990 Act added a mandate for hazardous air pollutant emission standards that expressly references cost:

> Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, *taking into consideration costs, energy, safety, and other relevant factors*, an adverse environmental effect.

§ 112(f)(2)(A), 42 U.S.C. § 7412(f)(2)(A) (emphasis added). Though Congress thus knew full well how to incorporate non-health factors such as cost into EPA standard-setting, it made no such change in § 109(b)(1).

In short, the statute and its development overwhelmingly demonstrate the correctness of the D.C. Circuit's longstanding precedent holding that the Act's provisions governing primary NAAQS bar EPA from considering "any factor other than health effects relating to

pollutants in the air." App. 13 (internal quotations omitted). Accordingly, the cross-petitions seeking to reopen that long-settled issue should be denied.

IV. THE QUESTIONS PROPOSED IN THE CROSS-PETITIONS SHOULD BE REJECTED AS ARGUMENTATIVE.

In addition to raising questions the Court should not and need not entertain, the questions proposed in the cross-petitions are argumentative, and should be rejected on that ground as well. Sup. Ct. R. 14.1(a) (questions "should not be argumentative").

The question proposed by ATA's cross-petition assumes (by using the phrase "given that") that consideration of non-health factors would avoid constitutional nondelegation issues. As shown above, however, the Clean Air Act – an EPA's interpretation of the Act – are constitutional, regardless of whether consideration of non-health factors is prohibited, allowed or required. Part I.A, *supra*. Moreover, incorporation of non-health factors into § 109(b)(1) would broaden, not narrow, the scope of the congressional delegation. Part I.B, *supra*.

The question proposed by Appalachian Power's cross-petition makes at least three argumentative assumptions. First, it assumes that EPA's decisions under § 109 consist exclusively of "risk management" – words that appear nowhere in the statutory provisions governing NAAQS. Second, it assumes that NAAQS have "*broad* economic, environmental, and indirect public health consequences." (Emphasis added.) The validity of certain impacts alleged by opponents of the 1997 NAAQS (*e.g.*,

alleged environmental impacts of changes in mine tax revenues, *see* App. 20, and alleged reductions in personal income that allegedly affect health) is disputed by many, including ALA.

Finally, and most egregiously, Appalachian Power's issue assumes that in the two rulemakings at issue here, EPA faced "a range of standards that reflect *uncertain and indistinguishable* health risks." (Emphasis added.) The EPA decisions under review "are based on some of the best scientific information the Agency has ever been able to rely on in NAAQS decision-making. In particular, the science underlying these decisions is much more extensive and of much better quality than the science underlying the existing NAAQS for PM and ozone." 62 Fed. Reg. 38881 n.53 (July 18, 1997). The D.C. Circuit did not in any way question the validity of the science relied on by EPA, and on the contrary found that EPA's decision to set a fine particulate standard "easily" satisfied the statutory standard. App. 51. "Given EPA's statutory mandate to establish standards based on 'the latest scientific knowledge,' 42 U.S.C. §§ 7408(a)(2), 7409(d), the growing empirical evidence demonstrating a relationship between fine particle pollution and adverse health effects amply justifies establishment of new fine particle standards." *Id.*

Based on the science, EPA concluded that the 1997 NAAQS would each year prevent thousands of deaths, thousands of hospitalizations for respiratory and cardiopulmonary causes, tens of thousands of cases of reduced lung function and respiratory pain, and millions of days of missed work and restricted activity. ALA Pet. at 6, 12.

Appalachian Power's attempt to assume away these findings with an argumentatively worded question should be rejected.

V. THE COURT SHOULD REJECT CROSS-PETITIONERS' ARGUMENT THAT, INDEPENDENTLY OF ANY CROSS-PETITION, THE ISSUE CONCERNING NON-HEALTH FACTORS MAY STILL BE PRESENTED TO THE COURT.

Cross-petitioners ATA and Appalachian Power argue that their cross-petitions are unnecessary, because ATA and Appalachian Power allegedly can raise the non-health factors issue independently of any cross-petition. ATA Cross-Pet. at 27-30; Appalachian Power Cross-Pet. at 4. Indeed, Appalachian Power has even attempted to reformulate the nondelegation question presented by ALA, EPA, and Massachusetts in such a manner as to incorporate that issue. Appalachian Power Rsp. at i (asserting that nondelegation question should include consideration of "whether the court of appeals properly construed the scope of the Agency's discretion in defining [intelligible] . . . criteria."). To the contrary, as ALA has shown above, the non-health factors issue is not a part of – and is not necessary or helpful to resolution of – the constitutional nondelegation issue. Moreover, insertion of that issue into the case would not "preserve" the judgment below, but on the contrary would "change" it. *See* ATA Cross-Pet. at 27 (quoting *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999)).

ATA argues that because EPA must (for reasons other than the lower court's nondelegation ruling) conduct

further proceedings in any event, cross-petitioners' proposed issue would not change or enlarge cross-petitioners' rights. ATA Cross-Pet. at 27-30. This argument is doubly flawed. First, it is open-ended: because § 109(d)(1) mandates cyclical EPA review of NAAQS at intervals not exceeding five years, EPA will *always* be facing the need to conduct further proceedings. Second, the judgment below did not simply require EPA to conduct further proceedings, but also defined requirements governing those proceedings. In particular, EPA must identify a "determinate criterion for drawing lines," App. 5, in a manner that considers only "health effects relating to pollutants in the air." App. 13 (citation omitted). Cross-petitioners' proposed question would (if cross-petitioners prevail) change these requirements, such that cross-petitioners would have an opportunity to argue on remand for consideration of non-health factors – and EPA would no longer be able to assert a lack of statutory authority to undertake such consideration. Indeed, Ohio argued below not only that EPA has authority under the Clean Air Act to consider non-health factors, but also that the Unfunded Mandates Reform Act *requires* the agency to exercise that authority by considering those factors. Ohio Opening Br. in D.C. Cir. No. 97-1440 at 15 ("the CAA, in conjunction with UMRA, affirmatively *compels* EPA to consider cost and benefits") (emphasis added). *See also* p. 3, *supra* (citing assertions by cross-petitioners in this Court that EPA must consider non-health factors).

In short, cross-petitioners' argument concerning non-health factors seeks both a change in – and an enlargement of cross-petitioners' rights under – the D.C. Circuit's judgment. Accordingly, cross-petitioners' assertion

that they may raise that argument independently of a cross-petition should be rejected.

CONCLUSION

For the foregoing reasons, the cross-petitions of ATA and Appalachian Power should be denied.[8]

DATED: April 12, 2000.

Respectfully submitted,

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[8] ALA takes no position on the cross-petition of Citizens for Balanced Transportation.

(15) (13) (13)

Nos. 99-1257, 99-1263, 99-1265

Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS AND THE STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF OF MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF STATE PETITIONERS

This case concerns two separate rules issued by EPA with respect to two different pollutants: particulate matter and ozone. The court below invalidated both rules on the basis of the "nondelegation" doctrine. A large number of respondents concede that this deviant but important constitutional ruling warrants this Court's review. (Brief in Response for Respondents American Trucking Associations, *et al.*, 10 ("ATA Resp."); Brief in Response for States of Ohio, Michigan and West Virginia 3 ("Ohio Resp.").) However, one group of respondents avers that the lower court's invalidation of EPA's rules on the basis of a constitutional doctrine not used by this Court to overturn a statute in more than six decades is so "pedestrian" that it requires "no comment, let alone Supreme Court review." (Brief in Response for Appalachian Power Co., *et al.*, 24 ("App. Pwr. Resp.").) As set forth below, however, respondents premise this audacious claim on a mistaken reading of the opinion below, and on the implicit constitutionalization of basic principles of administrative law.

The court also held that the ozone standard could not be enforced. As to the question whether this ruling comports with the Clean Air Act, all respondents urge this Court to leave matters where they stand. But the two questions that petitioners have brought before this Court concerning the ozone standard – constitutional and statutory – should be heard together. Unless this Court grants review of the statutory question whether EPA may enforce the revised ozone standard, review of the constitutional question *as it applies to the ozone rule* may amount to a pointless exercise in abstraction. To avoid this eventuality, the Court should grant review of both questions, constitutional and statutory, presented by petitioners.

1. *The constitutionality of the Clean Air Act as applied to EPA's revised rules.*

The court below held that the "statutory language" of the Clean Air Act and the "existing agency interpretation" of that language "involve an unconstitutional delegation of power." (Appendix to State Petitioners' Petition for Certiorari 12 ("App.").) Many respondents, including the State of Ohio, concede that this remarkable constitutional ruling warrants this Court's review. (ATA Resp. 10; Ohio Resp. 3.) When the United States Government and States that are parties to a case collectively request this Court's review and when, moreover, a large contingent of industry parties acquiesces in that request, such a case comes to this Court with a heavy presumption that review is warranted.

Despite their sensible concession about the importance of this case, however, Respondents ATA, *et al.*, attempt to recast the decision below as a "work-a-day" remand under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (ATA Resp. 14.) Similarly, Respondents Appalachian Power, *et al.*, strain to fit the court's problematic constitutional decision into the familiar framework of "arbitrary and capricious" review under the Administrative Procedure Act and statutory interpretation under *Chevron* (App. Pwr. Resp. 12-13, 15.) Respondents National Stone Association, *et al.*, make a similar attempt. (Brief in Response for Respondents National Stone Association and Kennecott Holdings Corporation, *et al.*, 7-8 ("Nat'l Stone Resp.").) These efforts to domesticate the D.C. Circuit's bold ruling do not succeed.

Tellingly, none of the respondents defends the lower court's ruling that the "statutory language" of the Clean Air Act violates the nondelegation doctrine. (App. 12.) Instead, respondents seek to reassure this Court that the constitutional status of the Clean Air Act itself – which has been on the statute

books for three decades and has been the subject of numerous judicial challenges, including several in this Court – is secure. (App. Pwr. Resp. 8 ("The court did *not* hold the statute itself unconstitutional");ATA Resp. 15 (statute "undisputedly is not" unconstitutional)). Presumably, respondents recognize that a failure to concede the constitutionality of the Clean Air Act would place their views at obvious odds with this Court's numerous precedents upholding far broader delegations against constitutional attack (discussed in our petition at 18-21). Thus, rather than acknowledging that the court below found that the "statutory language" of the Clean Air Act violated the nondelegation doctrine (App. 12), respondents repeatedly claim that the court found only that EPA's *interpretation* of the Act was unconstitutional.

But how does a statute that is "undisputedly" constitutional somehow *become* unconstitutional when interpreted by an administrative agency?

Respondents Appalachian Power, *et al.*, offer the most adventuresome answer to this question. Distancing themselves from the dubious constitutional grounding of the D.C. Circuit's opinion, these respondents implicitly equate the arbitrary and capricious standard of review with the constitutional doctrine of delegation. For example, respondents cite decisions based on the arbitrary and capricious standard as if those decisions support the D.C. Circuit's constitutional ruling. (See, e.g., App. Pwr. Resp. 17 (citing *American Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).) Even more bewilderingly, respondents also suggest that the D.C. Circuit's rationale for remanding EPA's rules

> might as well have been articulated as "arbitrary and capricious" agency action – that EPA failed to state a rational basis for its decision. *Whatever the rationale*, the

> proposition that an agency's discretion must be guided by an intelligible criterion is so pedestrian as to require no comment, let alone Supreme Court review. (App. Pwr. Resp. 12-13 (footnotes omitted, emphasis added).)

See also Nat'l Stone Resp. at 7-8. Respondents' casual equation of the nondelegation doctrine with the arbitrary and capricious standard should not be countenanced.[1] Respondents'

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[1]It is possible that the respondents, in the passage cited in text, are inartfully attempting to defend the court's judgment on the basis of an argument not reached by the court below. This Court should not decide the question whether EPA's rules are arbitrary and capricious. Addressing this question would require systematic, in-depth scrutiny of the voluminous record in this case. This complex and fact-bound issue should be considered in the first instance by the appeals court. Moreover, respondents did not present this argument in this same form below, and therefore the question whether EPA's rules are arbitrary and capricious in the way respondents now allege is not properly before this Court. With respect to particulate matter, for example, respondents did not argue to the lower court that EPA's revised particulate matter rule was arbitrary and capricious due to the agency's failure to explain why it targeted one pollutant level rather than another. Rather, respondents took issue with the scientific evidence underlying the revised standard, see Brief of Non-State Petitioners on Fine Particulate Matter NAAQS, and with EPA's failure to consider the effects of the rules on small businesses, see Brief of Small Business Petitioners and Intervenor (PM Rule). Likewise, with respect to the ozone standard, respondents challenged the scientific evidence underlying EPA's finding of an unacceptable risk to human health, but did not ask the court to require EPA, in the name of arbitrary and capricious review, to set "determinate, binding standards" such as those ultimately

theory would threaten to turn every departure from the principles articulated in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), into a constitutional case. Needless to say, such a result would vastly and inappropriately enlarge courts' authority to invalidate agency action on constitutional grounds.

Respondents Appalachian Power, *et al.*, also offer a second theory as to how an "undisputedly" constitutional statute may be transmuted into an unconstitutional one in an agency's hands, and in this instance they are joined in their argument by respondents ATA, *et al.* Respondents contend that the court's ruling invalidating EPA's rules under the Clean Air Act on constitutional grounds is "functionally indistinguishable" from a "work-a-day" ruling that, according to the principles of *Chevron*, the agency simply misinterpreted the Clean Air Act. (ATA Resp. 14; *see also* App. Pwr. Resp. 13 & n. 27, 15; *cf.* Nat'l Stone Resp. 9).[2]

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required by the court (App. 12). See Brief of Non-State Clean Air Act Petitioners and Intervenors 48-53 (Ozone Rule).

[2]Although all of the respondents appear to agree that EPA misinterpreted the Clean Air Act, they do not agree as to how the agency *should* have interpreted the Act. For example, compare Nat'l Stone Resp. 9 (arguing that EPA misinterpreted Act in not quantifying risk before regulating) with App. Pwr. Cross-Pet. (arguing that EPA misinterpreted Act to preclude consideration of factors unrelated to public health effects resulting from pollution's presence in ambient air). As we discuss in our opposition to respondents' cross-petitions, respondents offer quite a varied array of different possible interpretations of the Clean Air Act in the course of arguing that the meaning of the statute is clear. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

Nowhere did the court below suggest, however, that EPA had *misinterpreted* the Clean Air Act. Indeed, the court *upheld* EPA's longstanding interpretation of the statute to forbid the consideration of costs and feasibility in setting the NAAQS. (App. 17-20.)[3] Rather than finding that EPA's position was a misinterpretation of the Clean Air Act, the court found that the agency's interpretation, though permissible under the statute, was unconstitutional. This ruling is a world away from a ruling that EPA merely misinterpreted the statute. Here, too, therefore, respondents work hard to dismiss the constitutional significance of the court's ruling, and in doing so both misread the court's opinion and intimate that agencies that violate *Chevron*, violate the Constitution. (App. Pwr. Resp. 16 & n. 35 (citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), a garden-variety statutory interpretation case, as a "'nondelegation'" case).)

Respondents' understandable desire to distance themselves from the dubious constitutional foundations of the lower court's decision cannot be squared with their argument that the constitutional status of the Act as interpreted for thirty years is so seriously in doubt that this Court should rewrite the Act in order to avoid deciding a constitutional question. (ATA Cross-Pet. I.) Respondents cannot have it both ways. An "undisputedly" constitutional statute does not require or permit invocation of the canon counseling avoidance of constitutional decisions: "The canon about avoiding constitutional decisions . . . must be used with care, for it is a closer cousin to invalidation than to interpretation. . . . Constitutional decisions breed penumbras, which multiply questions. Treating each as

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[3]In our Brief in Opposition, we explain why the Conditional Cross-Petitions on this statutory question should be denied. *See* Brief in Opposition for Petitioners Massachusetts and New Jersey.

justification to construe laws out of existence too greatly enlarges the judicial power." *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook, J.).

2. *The enforceability of the revised ozone standard.* Respondents do not seek review of the D.C. Circuit's ruling that the Clean Air Act authorized EPA to revise the air quality standard for ozone. (App. 31-33.) Nor do they challenge the court's holding that EPA must designate areas as attainment, nonattainment, or unclassifiable under the revised standard. (App. 33-34.) Nevertheless, they argue that the court's ruling that section 181(a)(1) precludes EPA from *enforcing* the revised ozone standard is unworthy of this Court's review because the court's decision is correct and because the ruling is in an interlocutory posture. Neither of these assertions has merit.

In arguing that the language of section 181(a)(1) supports the lower court's ruling, respondents ignore most of the language of this provision. As we set forth in detail in our Petition, the language of sections 181 and 182 overwhelmingly points to the conclusion that these provisions are exclusively concerned with implementation of the former, one-hour ozone standard – the standard that existed when these sections were enacted. (Pet. 21-25.)

Respondents also never confront the absurd implications of the lower court's interpretation of section 181(a)(1). The court held that EPA may revise the ozone standard and, if it does so, it *must* designate areas according to their attainment status *under the revised standard.* (App. 33-34.) However, if section 181(a)(1) is interpreted as the court below interpreted it, then the agency must *disregard its designations under the revised standard* and *classify* areas according to the previous, one-hour ozone standard. (Pet. 23-24.) This conclusion follows from the plain language of section 181(a)(1): areas

designated nonattainment under this provision must be classified "according to the interpretation methodology issued by the Administrator most recently before the date of the enactment of the Clean Air Act Amendments of 1990." 42 U.S.C. 7511(a)(1). The interpretation methodology in effect at that time was based on the previous, one-hour ozone standard. (Pet. 23 & n. 9). Thus, if EPA must, as the court below held and as respondents claim, classify areas under the revised standard under section 181(a)(1) of the Act, and not under Subpart 1, then EPA will be forced to classify areas according to the ozone standard that it has abandoned. There is no warrant in the language, structure, or purpose of the Clean Air Act for sanctioning such an odd result.[4]

Nor does the legislative history support respondents' awkward reading of section 181(a)(1). Respondents ATA, *et al.*, claim that "Congress *specifically considered* and *rejected* bills that would have expressly limited Subpart 2's reach in just the manner EPA claims that *enacted* statute does." (ATA Resp. 23 (emphasis added and in original).) While it is true that the version of Subpart 2 contained in the original House and Senate bills referred specifically to the bills' equivalent of section 107(d)(4) rather than to 107(d) as a whole, there is nothing in

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[4]Subsequent legislation confirms our reading of the statute. In the Transportation Equity Act for the 21st Century, Congress reaffirmed the States' and EPA's obligations to designate areas under the revised ozone standard. Congress extended the States' statutory deadline for submitting designations, and shortened EPA's deadline for promulgating them. Pub. L. No. 105-178, § 6103, 112 Stat. 465 (1998). Under respondents' interpretation of the Clean Air Act, Congress, in taking this action in 1998, simply – pointlessly – reaffirmed the States' and EPA's obligations to promulgate designations that would then be completely ignored.

the legislative history to suggest that this change was meant to transform a revised ozone standard from an enforceable standard into an unenforceable one. Indeed, the failure to include the single number "(4)" in the final law – which, on respondents' reading, dramatically reworked the regulatory scheme – went unremarked in the legislative history.[5]

Respondents also argue that the question whether the revised ozone standard may be enforced is in an "interlocutory posture" because EPA must now, in light of a part of the D.C. Circuit's decision not challenged here, consider and evaluate the claim that smog is good for people. (*E.g.*, App. Pwr. Resp. 29-30.) Respondents claim that EPA must now redo the entire process of setting air quality standards, including issuing a new Criteria Document – a process that Respondents ATA, *et al.*, assert will take from "three to five years." (ATA Resp. 17.)

Even assuming that respondents are correct in claiming that EPA must now entirely redo its work on the ozone standard, and even assuming they are correct that this process will take from three to five years, this gives this Court all the more reason to grant review of the question whether the ozone standard may be enforced. For if respondents are correct, EPA must now engage in a lengthy and complex process, likely involving scores of agency personnel, in order to revise a standard that the court below has ruled cannot be enforced. This would be a colossal waste of precious resources.[6]

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[5]*See* H.R. Rep. No. 101-490, Pt. 1, at 229-232, *reprinted in* 2 1990 Legis. Hist. 3253-3256.

[6]Respondents also oppose review on the Subpart 2 issue on the ground that the lower court has "left open the door" to further proceedings with respect to Subpart 2. (ATA Resp. 20, citing the United States' appendix to its petition, at 81a.) The

Many of the parties in this case agree that the question whether EPA's revised ozone standard violates the nondelegation doctrine is worthy of this Court's review. Yet unless this Court also agrees to review the question whether this standard may be enforced, review of the constitutional question pertaining to the ozone standard may turn out to be a pointless exercise, as it may succeed only in either ratifying or undoing an agency standard that in any event may not be enforced. In this way, the constitutional and statutory questions petitioners have raised are closely connected, and this Court should review them together.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

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only proceedings for which the court left open the door, however, are proceedings to reconsider the court's decision *not to vacate* the ozone standard. (U.S. App. 81a.)